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CIVIL LITIGATION UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

*Richard T. Phillips**

The Employee Retirement Income Security Act of 1974 (ERISA)[1] is the federal government's first comprehensive approach to the regulation of private pension plans.[2] ERISA's impact is enormous. Prior to Labor Day, 1974, when ERISA was signed into law, private pension plans represented the largest collection of private assets to escape effective federal regulation.[3] These monies totalled approximately one hundred and fifty billion dollars in 1973 with over thirty million workers and their families covered.[4] By 1980, pension assets are expected to exceed two hundred and fifty billion dollars,[5] and it is predicted that within the next decade every employer with more than ten employees will be required to establish some form of pension plan.[6]

Favorable tax treatment and growing pressure for provisions to promote the economic security of workers has led to a widespread and vigorous rate of growth in the use of private pensions since 1940.[7] Initial growth was fostered during World War II and the Korean War when wage stabilization programs froze wage increases while permitting increases in other forms of compensation.[8] Pensions received an additional impetus for growth during this period when the Seventh Circuit held in *Inland Steel Co. v. NLRB*[9] that pension plans were subject to "compulsory collective bargaining" because they were a form of payment for work under the National Labor Relations Act.[10] These factors led to a growth in the number of workers covered by private pensions from just over four million in 1940 to over thirty million by 1970.[11]

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[1] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 5, 18, 26, 29, 31 U.S.C. and I.R.C. §§ 404, 6511(d)).

[2] Hutchinson, *The Federal Prudent Man Rule Under ERISA*, 22 VILLANOVA L. REV. 15, 15 (1976). ERISA regulates virtually all "employee benefit plans" which are defined as including "pension plans" and "welfare benefit plans." 29 U.S.C. §§ 1002(3), 1003(a) (1976). "Welfare benefit plans" provide nonpension benefits such as medical and accident insurance. *Id.* § 1002(1) (definition). Although the scope of this article is limited to pension plans, it should be noted that many of ERISA's provisions apply to both pension and welfare benefit plans. *Id.* §§ 1021-1031 (reporting and disclosure requirements); *id.* §§ 1101-1114 (fiduciary standards); *id.* §§ 1131-1144 (administrative and enforcement provisions).

[3] S. REP. NO. 127, 93d Cong., 1st Sess. 4 (1973), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4838, 4840.

[4] *Id.* at 3, U.S. CODE CONG. & AD. NEWS at 4839-40.

[5] *Id.*, U.S. CODE CONG. & AD. NEWS at 4840.

[6] Dondanville, *The Pension Act: The Civil Liability View*, 43 INS. COUNSEL J. 556, 556 (1976).

[7] Project, *The Employee Retirement Income Security Act of 1974: Policies and Problems*, 26 SYRACUSE L. REV. 539, 542-45 (1975).

Mississippi has shared in the nationwide growth in the use of pension plans. Such plans will be of growing importance to Mississippi workers and their families as the state experiences continued industrial growth. The civil litigation provisions of ERISA provide new protections and open new forums for pensioners seeking to enforce their pension rights. The Act also contains a variety of civil and criminal penalties for violations of its provisions. The Mississippi attorney, whether representing employer, employee or fiduciary, needs to be familiar with ERISA's provisions. The following discussion will trace the need for the development of pension rights, and then outline the statutory civil litigation provisions in ERISA with pertinent pre-Act and post-Act case law reviewed.

II. THE DEVELOPMENT OF PENSION RIGHTS

Prior to the enactment of ERISA the rights of pensioners were, at best, questionably enforceable. Several theories concerning the legal rights of pensioners in their pension funds were developed, but each proved to be inadequate in protecting the pensioner from loss of benefits. When pension plans were first used they were viewed as a gratuity from employer to employee. Under this view, the "gratuity theory,"[12] the employee had no right in the pension and the employer could withdraw or discontinue pension benefits at will.[13]

Subsequently, the doctrine emerged that pensions were contracts between employer and employee.[14] Under the "contract theory," a pension plan created a unilateral contract with the employee's pension fund rights vesting only upon his performance of continued service for a stipulated time.[15] While the contract theory allowed for the enforcement of some pension rights, it too proved ill adapted to meet the needs of an ever burgeoning group of pensioners. Courts tended to interpret plan indentures and technical wording strictly within the pension document, and refused to recognize concepts of equitable relief as being appropriate to the adjudication of pension rights.[16] An example of the harsh results that were possible when the logic of contract law was applied in the pension context is found in *Menke v. Thompson.*[17] In that case, a retiree who had been employed for forty-two years by the Missouri Pacific Railroad Company and then denied pension benefits brought suit contending he had a contractual right to pension funds.[18] The pension plan at issue required twenty-five years of continuous service, but the retiree had missed three months work during a union strike ten years before his retirement.[19] The court held that the retiree was not entitled to any pension benefits because the continuous service provision in the pension established a condition precedent to benefits which had not been met.[20]

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[8] *Id.* at 543.

[9] 170 F.2d 247 (7th Cir. 1948), *cert. denied,* 336 U.S. 960 (1949).

[10] 170 F.2d at 263-64. *See also* S. REP., *supra* note 3, at 3, U.S. CODE CONG. & AD. NEWS at 4839; Comment, *supra* note 7, at 543.

[11] Project, *supra* note 7, at 542.

[12] *Id.* at 629.

[13] *Id.; e.g.,* McNevin v. Solvay Process Co., 32 App. Div. 610, 613, 53 N.Y.S. 98, 100 (4th Dept. 1898), *aff'd mem.,* 167 N.Y. 530, 60 N.E. 1115 (1901).

[14] Note, *Pension Plans and the Rights of the Retired Worker,* 70 COLUM. L. REV. 909, 916-17 (1970).

Another body of pension law developed characterizing the pension as a trust. The "trust theory" drew primarily from the common law of trusts and offered some useful remedies unavailable under other approaches.[21] Principally, the trust theory allowed pensioners to sue pension fund trustees for a breach of fiduciary duty.[22] Consequently, trustees could be held personally liable for all pension fund losses caused by a breach.[23] The remedies of injunction and declaratory judgment were also available where appropriate.[24] The law of trusts was developed to regulate transactions inherently different from those involving pensions, however, and left pensioners unprotected in certain critical respects.[25] For instance, there were no guidelines for the trustee concerning his selection of attorneys, investment managers, actuaries, and accountants for the pension fund.[26] Also, an employer was allowed to invest pension funds in his own business, and there was no right to information concerning the management of the pension fund.[27]

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[15] *Id.* at 917; *see, e.g.,* Lowndes Coop. Ass'n (AAL) v. Lipsey, 240 Miss. 71, 75-76, 126 So. 2d 276, 277-78 (1961) (retirement in reliance on pension created contract rights).

[16] S. Rep., *supra* note 3, at 5, U.S. Code Cong. & Ad. News at 4842.

[17] 140 F.2d 786 (8th Cir. 1944).

[18] *Id.* at 787-88.

[19] *Id.*

[20] *Id.* at 790-92.

[21] Project, *supra* note 7, at 634-35.

[22] *See* Restatement (Second) of Trusts § 205 (1959).

[23] *See id.*

[24] *See id.* § 199.

[25] Project, *supra* note 7, at 635.

[26] Landow, Merholtz & Perkins, *Protecting a Potential Pensioner's Pension—An Overview of Present and Proposed Law on Trustees' Fiduciary Obligations and Vesting,* 40 Brooklyn L. Rev. 521, 531 (1974).

In essence the contract and trust theories of enforcement were fraught with inadequacies and uncertainties and proved unsatisfactory as mechanisms for enforcement of pension rights.

Pre-ERISA statutory law did little to improve the situation for pension and retirement participants and beneficiaries. Section 302 of the Labor-Management Relations Act, the Taft-Hartley Act,[28] provided a statutory base from which the concept of employee benefit plans as trusts developed. The majority of courts, however, refused to interpret the Taft-Hartley Act as vesting jurisdiction in the federal courts to enforce fiduciary responsibility in the administration of trust funds.[29] For example, in *Cuff v. Gleason,*[30] a disabled longshoreman brought suit against the trustees of a trust created under the Labor Management Relations Act.[31] Although the district court held that the plaintiff was entitled to disability benefits,[32] the judgment was vacated on appeal and the case dismissed for lack of jurisdiction.[33] Similarly, in *Moyer v. Kirkpatrick,*[34] two union members brought suit for a declaratory judgment that the trustees of a union trust fund were not managing the fund properly.[35] The court held it lacked jurisdiction under the Taft-Hartley Act because the evident purpose of the Act was to prohibit payments by employers to employee union representatives.[36] The court stated that the Act's jurisdictional grant was "clearly designed to prevent the prohibited payments," not to authorize the federal courts to oversee or regulate plans in general.[37]

The Labor-Management Reporting and Disclosure Act[38] affected private pension plans, but its application was limited to the activities of union officials. Thus, the Act did not reach employer-appointed trustees.[39] The Welfare and Pension Plan Disclosure Act (WPPDA)[40] dealt directly with private pension plans. The emphasis of the Act, however, was on reporting and disclosure of plan operation and administration, and it contained few provisions regarding control of plan management or enforcement of benefit rights.[41] The general view concerning the Act's purpose was expressed in *Fiberman v. Cook,*[42] where the plaintiff sought payment of his vested interest in a profit sharing plan subject to WPPDA regulations.[43] In dismissing the suit for want of jurisdiction, the district court held that the plaintiff had failed to state a cause of action under the Act.[44] Moreover, the court stated that the limited purpose of the WPPDA was "to secure disclosure and reporting with respect to . . . pension plans," and that the Act "was not intended to transfer to the federal courts general jurisdiction over the administration of such plans and adjudication of amounts due various beneficiaries."[45] Under the WPPDA then, the only private cause of action that existed was for a fifty dollar per day statutory penalty that could be impressed against a plan administrator for a failure to disclose plan information.[46]

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[27] Project, *supra* note 7, at 635.

[28] 29 U.S.C. §§ 141-188 (1976).

[29] *See, e.g.*, Bowers v. Ulpiano Casal, Inc., 393 F.2d 421, 423 (1st Cir. 1968) (§ 302's purpose was not to regulate performance of fiduciary duties, but to eliminate payments by employers to union representatives); Moyer v. Kirkpatrick, 265 F. Supp. 348, 350-51 (E.D. Pa. 1967) (§ 302 designed to eliminate improper relationship between employers and union officials), *aff'd per curiam*, 387 F.2d 955 (3d Cir. 1968); *accord*, Employing Plasterers' Ass'n v. Journeymen Plasterers' Local 5, 279 F.2d 92, 97 (7th Cir. 1960) (misuse of funds).

[30] 515 F.2d 127 (2d Cir. 1975).

[31] *Id.* at 127-28.

[32] *Id.* at 128; Cuff v. Gleason, 382 F. Supp. 1144, 1146 (E.D.N.Y. 1974).

[33] 515 F.2d at 129.

[34] 265 F. Supp. 348 (E.D. Pa. 1967), *aff'd per curiam*, 387 F.2d 955 (3d Cir. 1968).

[35] 265 F. Supp. at 349.

[36] *Id.* at 351.

[37] *Id.*

[38] 29 U.S.C. §§ 401-531 (1976).

In a later case interpreting the WPPDA, *Nolan v. Myer,*[47] it was held that the Act did not confer a federal common law cause of action to contest the validity of a forfeiture clause in a profit sharing plan, or to recover the benefits forfeited.[48] The Second Circuit, basing its holding principally on *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Ware,*[49] stated that the Act does not define "a substantive right for the enforcement of which a remedy for the collection of profit sharing benefits may be implied."[50]

Federal criminal statutes offered a vehicle for prosecuting violations for theft, embezzlement, or bribery affecting private pension plans but, as congressional studies show, this technique afforded pensioners minimal protection.[51] In summary, pre-ERISA statutory law provided neither direct preventive regulations nor satisfactory relief methods for participants or beneficiaries in the event of plan abuses or failures.[52]

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[39] *See id.* § 501; Tucker v. Shaw, 308 F. Supp. 1, 3 (E.D.N.Y. 1970) (legislative intent was to exclude employer-appointed trustees from the Act).

[40] 29 U.S.C. §§ 301-309 (1976).

[41] Congress' expressed policy was to protect pension beneficiaries "by requiring the disclosure and reporting . . . of financial and other information." *Id.* § 301.

[42] 343 F. Supp. 558 (W.D. Pa. 1972).

[43] *Id.* at 559-60.

[44] *Id.* at 561-62.

[45] *Id.*

[46] *Id.* at 561; 29 U.S.C. § 308(b) (1976).

[47] 520 F.2d 1276 (2d Cir.), *cert. denied,* 423 U.S. 1034 (1975).

[48] 520 F.2d at 1278-80.

[49] 414 U.S. 117, 125-40 (1973) (extensive federal regulation of securities industry did not warrant federal preemption of state law governing wage dispute with securities broker).

[50] 520 F.2d at 1280.

[51] Hutchinson, *supra* note 2, at 20-21; *see* SENATE COMM. ON LABOR AND PUBLIC WEL-

The inadequacy of existing remedies in statutory and case law was a major force in the passage of ERISA.[53] The legislative history of the Act is replete with examples of misuse of pension funds by plan sponsors or employers, poor plan administration, and violations of basic fiduciary obligations in the handling of pension plans.[54] As a result of the congressional desire "to strengthen and improve the protection and interests" of pensioners, ERISA is a comprehensive law which covers virtually all employee benefit plans.[55]

By giving employees specific enforceable rights in their pensions, ERISA does much to eradicate pension law concepts in vogue before its enactment. Employees must be allowed to participate in the plan after a minimum specified period of employment.[56] Similarly, their rights in the pension assets must vest after a designated time on the job, depending on which of several alternative schedules adopted by the Act the plan incorporates.[57] Plans must now be properly funded, and in some cases, the benefits insured.[58] The employee's right to disclosure of information concerning pension plan provisions and the plan's administration is embodied in the Act.[59] Also, many of the gaps in pre-ERISA pension law were filled by the Act's characterization of pension plans as trusts, the concurrent imposition of stringent standards governing fiduciary conduct, and the delineation of affirmative fiduciary duties and specifically prohibited transactions.[60] ERISA's coverage extends to virtually all private pension plans, thus bringing improved pension rights to millions of workers.[61]

FARE, INTERIM REPORT OF ACTIVITIES OF THE PRIVATE WELFARE AND PENSION PLAN STUDY, S. REP. No. 634, 92d Cong., 2d Sess. 95 (1972) (few convictions for burglary and embezzlement during 1971).

[52] S. REP., *supra* note 3, at 3, U.S. CODE CONG. & AD. NEWS at 4840; Note, *supra* note 14, at 909.

[53] S. REP., *supra* note 3, at 1-5, U.S. CODE CONG. & AD. NEWS at 4838-42. The report states that ERISA was generated "to strengthen and improve the protections and interests of participants and beneficiaries of employee pension . . . plans." *Id.* at 1, U.S. CODE CONG. & AD. NEWS at 4838.

[54] *Hearings on Private Welfare Pension Plan Study Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. *passim* (1972) (many pensioners learned of disqualifications from benefits only after many years of work or retirement, when they were least able to adjust to a loss of expected income).

[55] Project, *supra* note 7, at 549-50.

[56] 29 U.S.C. § 1052(a) (1976) (delineates "minimum participation standards").

[57] *Id.* § 1053 (covers "minimum vesting standards" and supplies schedules which correlate years of service with nonforfeitable percentages in the pension fund).

[58] *Id.* §§ 1301-1381.

[59] *Id.* §§ 1021-1031.

[60] *Id.* §§ 1101-1114.

[61] *Id.* § 1101.

The rights given to pensioners in ERISA are enforceable through the Act's civil litigation provisions. While the Act provides for both criminal and tax penalties[62] for violations of its provisions, the civil litigation provisions afford effective remedies to the aggrieved pensioner.

These provisions should be used to settle honest benefit disputes which naturally arise in pension programs, and to enforce liability for fiduciary abuses in the administration of the plans.

III. STATUTORY CIVIL LITIGATION PROVISIONS OF ERISA

A. *Parties*

ERISA expressly provides for civil actions by three categories of plaintiffs: (1) plan participants or beneficiaries, (2) fiduciaries, and (3) the Secretary of Labor.[63] Persons in the first category may bring civil actions under ERISA to enforce private claims to plan benefits.[64] These suits may be brought to recover benefits due under a plan, to enforce rights given by a plan, or to clarify rights to future benefits.[65] Civil actions are also available to plan participants or beneficiaries to obtain equitable relief or to enjoin practices that violate any of ERISA's provisions or the terms of a specific plan.[66] Additionally, civil litigation is an appropriate method by which participants or beneficiaries may compel compliance by the plan administrator with the reporting and disclosure provisions of the Act.[67] An extremely important avenue of litigation open to this class of plaintiffs is a suit for breach of a fiduciary duty.[68] Because of the importance and complexity of this aspect of ERISA, it will receive separate treatment later in the discussion.[69]

Civil actions may also be brought by plan fiduciaries. Fiduciaries may sue to enjoin practices that violate ERISA or the terms of a specific plan, to enforce the affirmative requirements of the Act or a plan, and to receive equitable relief under the terms of the Act.[70] Significantly, ERISA requires that a fiduciary who knows of a breach of duty by a cofiduciary take reasonable steps to remedy the breach or be liable himself for the breach.[71] This requirement may, under the right circumstances, compel one fiduciary to bring suit against another. This result offers important protection for pensioners since fiduciaries are often the first to know of any improper handling of a pension fund.[72]

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[62] *Id.* § 1131 (criminal penalties); I.R.C. §§ 4971-4975 (tax penalties).

[63] 29 U.S.C. § 1132(a) (1) (A), (2), (3), (4) (1976).

[64] *Id.* § 1132(a) (1) (B).

[65] *Id.*

[66] *Id.* § 1132(a) (3).

[67] *Id.* § 1132(a) (1) (A), (C).

[68] *Id.* § 1132(a) (2).

[69] See text accompanying notes 186 through 234 *infra.*

[70] 29 U.S.C. § 1132(a) (2), (3) (1976).

[71] *Id.* § 1103(a) (3).

Civil suits for violations of ERISA may also be brought by the Secretary of Labor.[73] The Department of Labor is authorized to initiate actions for violations of the participation, vesting or funding standards of the Act if requested to do so by the Secretary of the Treasury or one or more participants, beneficiaries, or fiduciaries of a plan.[74] The Secretary of Labor is also given broad and significant investigative authority, including subpoena power to enable discovery of ongoing or potential violations of the Act.[75] An important additional provision authorizes the Department of Labor to intervene in civil actions brought by private parties. In any civil action other than one that is solely for the recovery of benefits brought by a participant, beneficiary, or fiduciary, the plaintiff is required to serve the Secretaries of Labor and Treasury with a copy of the complaint. Either secretary may, in his discretion, intervene in the action, except that the Secretary of Treasury may not intervene in suits for breach of a fiduciary duty.[76] Whether there will be Department intervention in a given case depends on several factors. Intervention is seriously considered

> whenever a lawsuit presents a novel issue which will in the Department's judgment seriously affect the future administration of ERISA, or the resolution of which will affect the understanding of a large number of people of their rights or responsibilities under the law, or which may be expected to influence significantly the manner in which persons similarly situated to the litigants will comply with ERISA.[77]

Given the Department's broad investigative authority under ERISA coupled with its resources and expertise, intervention could prove to be a major factor in the outcome of a given suit.

Defendants to civil actions brought under ERISA can be the trustees or administrators of a plan, all fiduciaries, and even the plan itself.[78] The broad statutory definition of fiduciary widens the range of potential defendants to include anyone with discretionary or advisory power in connection with the plan.[79]

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[72] Note, *Fiduciary Standards Under the Employee Retirement Income Security Act of 1974,* 63 GEO. L.J. 1109, 1136-37 (1975).

[73] 29 U.S.C. §§ 1132(a) (2), (4)-(6) (1976).

[74] *Id.* § 1132(b).

[75] *Id.* § 1134(a).

[76] *Id.* § 1132(h).

[77] 4 PENS. PLAN GUIDE (CCH) ¶ 25,105 (based on letter from Associate Solicitor of Department); *see, e.g.,* Marshall v. Snyder, 430 F. Supp. 1224, 1231-33 (E.D.N.Y. 1977) (intervention where consent order violated by trustees).

[78] 29 U.S.C. § 1109, 1132(d) (1) (1976).

While there are broad parties provisions in the Act, there are two cases which suggest some restrictions. *Hibernia Bank v. International Brotherhood of Teamsters*[80] was the first case in which ERISA's beneficiary and fiduciary definitions were tested. The case involved a civil action filed by a bank against a union, the trustees of the union's retirement trust funds, and a nonprofit corporation which provided administrative services to the fund.[81] The bank had acted as agent for the trust funds and performed the normal bank services with regard to the trusts.[82] The nonprofit corporation set up to administer the fund had amassed a large overdraft with the bank. Subsequently, the corporation became bankrupt.[83] The bank sued under ERISA to recover the amount of the overdraft alleging that it was either a beneficiary or fiduciary within the meaning of ERISA's statutory definitions.[84] The court dismissed the suit, holding that the bank did not have standing to sue since the bank's role as agent for the retirement trusts did not bring it under either definition.[85] The court stated that Congress did not intend banks to be beneficiaries. Furthermore, the bank could not be classified a fiduciary because its duties were "the simple maintainence of an account and the preparation of records" of the account.[86]

In *Kerbow v. Kerbow*,[87] two Texas cases arising from divorces were consolidated and resulted in another early judicial interpretation of ERISA's provisions dealing with standing to sue under the Act. The cases dealt with an attempt by ex-wives of pension plan participants to establish an interest in their former husbands' retirement funds.[88] State divorce decrees had given the plaintiffs rights in the funds, but the federal district court held that the decrees did not have the effect of making the plaintiffs "participants" or "beneficiaries" within the meaning of the statutory definitions.[89] Similarly, the fact that Texas is a community property state[90] did not affect the decision since the court interpreted ERISA's beneficiary and participant provisions as being "strictly and clearly defined in terms of status other than ownership."[91]

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[79] *Id.* §§ 1002(21) (A) (i), 1109.

[80] 411 F. Supp. 478 (N.D. Cal. 1976).

[81] *Id.* at 480-81.

[82] *Id.* at 481-82.

[83] *Id.* at 482.

[84] *Id.* at 488-89.

[85] *Id.* at 488-90.

[86] *Id.*

[87] 421 F. Supp. 1253 (N.D. Tex. 1976).

[88] *Id.* at 1256-58.

[89] *Id.* at 1259.

[90] Tex. Fam. Code Ann., tit. 1, § 5.01 (Vernon 1975).

[91] 421 F. Supp. at 1260.

Stating that the federal courts must scrupulously confine their jurisdiction to the precise limits of the federal statute, the court dismissed the ex-wives' ERISA claims against the husbands' employer for want of standing to sue under the Act.[92]

B. Jurisdiction

Before the passage of ERISA, pensioners often found access to the federal courts denied when attempting to enforce pension rights.[93] Despite the advancement of novel jurisdictional theories, federal jurisdiction was generally withheld. Typically, pension disputes were considered private employment affairs in which the courts were reluctant to interfere.[94] Congress completely changed the jurisdictional stance of suits to enforce pension rights with the enactment of ERISA.

ERISA expressly confers jurisdiction on the federal district courts for civil actions under the Act.[95] Federal jurisdiction is exclusive, except in suits by participants or beneficiaries to recover benefits or to enforce or clarify rights. In these suits, federal jurisdiction is concurrent with that of state courts.[96] Moreover, federal jurisdiction exists without regard to the amount in controversy or the citizenship of the parties.[97] Jurisdiction under ERISA applies to causes of action arising after January 1, 1975, the effective date of the Act.[98] For causes of action which arose prior to the effective date, pre-ERISA jurisdictional holdings remain in force.

Because of ERISA's recent effective date, there are only a few cases that interpret the Act's statutory grant of jurisdiction. Some of these initial decisions have dealt with the Act's restriction of jurisdiction to causes of action that arose after January 1, 1975. In *Morrissey v. Curran,*[99] a pensioner brought an action under ERISA against the trustee of a union pension fund, alleging improper investments of the plan's funds.[100] The district court dismissed the suit, holding that there was no jurisdiction since the specific acts complained of took place before the Act's effective date.[101] On appeal, the Second Circuit reversed and remanded, holding that jurisdiction would be present if, after the Act's effective date, the trustees had not disposed of investments that ERISA made improper to retain.[102] Consequently, jurisdiction under *Morrissey* can be generated by pre-ERISA improper investments that result in continuing violations of the Act through trustee inactivity.[103]

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[92] *Id.* It should be mentioned that a recent New York state decision held that ERISA's bar to assignment or alienation of pension benefits found in 29 U.S.C. § 1056(d) (1976), did not bar enforcement of a support order stemming from a divorce action where the order directed the husband's pension fund to deduct $100 per month from his fund and pay it over to the wife. *See* Cogollos v. Cogollos, 402 N.Y.S.2d 929, 929-30 (Sup. Ct. 1978). Though the case does not deal with the standing issue it does represent a potential avenue by which a spouse may obtain the other spouse's pension benefits through state court action. Of course the problem of ERISA preemption would have to be successfully overcome. For a discussion of ERISA preemption of state law, see text accompanying notes 148 through 174 *infra*.

[93] See notes 29 through 37, and notes 40 through 50 and accompanying text *supra*.

[94] *See, e.g.,* Golden v. Kentile Floors, Inc., 512 F.2d 838, 847 (5th Cir. 1975) (courts should not take upon themselves regulation of private schemes amenable to private regulation).

[95] 29 U.S.C. § 1132(e)-(f) (1976).

[96] *Id.* § 1132(e) (1).

[97] *Id.* § 1132(f).

[98] *Id.* § 1114(a); *see, e.g.,* Morrissey v. Curran, 567 F.2d 546, 548 & 548 n.5 (2d Cir. 1977) (cause of action must arise after Jan. 1, 1975 for federal courts to have jurisdiction under ERISA).

Martin v. Bankers Trust Co.[104] also addresses the issue of whether a pre-Act occurrence can result in a continuing violation of the Act. Martin had been employed by Tom's Foods Ltd. from 1949 to 1973 and was a participant in the company's pension plan.[105] Upon termination of employment, Martin made an application for pension benefits that was denied by the defendant-administrator of the plan.[106] Contending that the administrator's continued refusal to make benefit payments to him resulted in a continuing violation of the Act, the plaintiff brought suit under ERISA.[107] The plaintiff also sought to establish that ERISA's jurisdictional provisions, which make federal jurisdiction concurrent with that of state courts in suits by beneficiaries or participants to recover benefits, gave him a choice of a state or federal forum.[108] The district court dismissed the case for want of jurisdiction and the Fourth Circuit affirmed.[109] The court of appeals held that the statutory grant of concurrent jurisdiction affords a federal forum only when a federal cause of action exists under ERISA.[110] The court then went on to hold that the administrator's refusal to pay benefits did not amount to a continuing violation of the Act.[111] To support its decision, the court borrowed from an earlier analysis of the Taft-Hartley Act's prospective application to breaches of collective bargaining contracts. Under Taft-Hartley, a contract that was breached before the Act's effective date and that remained breached was not a "continuous breach" but "was complete at the time [of breach] . . . and any cause of action occurred in its entirety at that time."[112] The court then likened the administrator's refusal to pay benefits to a breach of contract and held that the plaintiff's cause of action arose in 1974 and that the requisite basis for jurisdiction was lacking.[113]

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[99] 567 F.2d 546 (2d Cir. 1977).

[100] *Id.* at 547.

[101] *Id.* at 547-48.

[102] *Id.* at 548-49.

[103] *See id.* The court noted that

> [t]he trustee's obligation to dispose of improper investments within a reasonable time is well established at common law . . . . ERISA can hardly be read to eviscerate this duty, especially in light of its requirement that fiduciaries take remedial action upon discoveries of breaches by co-fiduciaries.

Id. at 549 n.9 (citation omitted).

[104] 565 F.2d 1276 (4th Cir. 1977).

[105] *Id.* at 1277.

[106] *Id.*

[107] *Id.* at 1278.

[108] *Id.*

[109] 417 F. Supp. 923, 925-26 (W.D. Va. 1976), *aff'd*, 565 F.2d 1276, 1278-79 (4th Cir. 1977).

[110] 565 F.2d at 1278.

In *Marshall v. Chase Manhattan Bank,*[114] the Second Circuit found jurisdiction existent under ERISA in a suit filed by the Secretary of Labor for declaratory and injunctive relief concerning a trustee's accounting of a pension fund for the calendar year 1975. The employer who set up the pension had been adjudged bankrupt in 1974, and the defendant-trustee, Chase Bank, sought to terminate the plan in 1976. To accomplish this, the defendant sought judicial consent to termination and a judicial decree validating the trustee's account for the calendar years 1970 through 1975. This suit was filed in the supreme court of New York.[115] The Secretary of Labor then filed suit in federal court contending that the state court did not have jurisdiction to approve the trustee's 1975 account, because ERISA confers exclusive jurisdiction to the federal courts in actions regarding fiduciary conduct.[116] The defendant contended ERISA was inapplicable since the employer, who set up the plan, was not within ERISA's definition of employer. The defendant also asserted that the federal district court should abstain since the settlement of accounts was still pending in state court.[117] On its own motion, the district court dismissed the action "on the ground that the only appropriate way to proceed is . . . to make a motion in the state court to dismiss . . . for lack of subject matter jurisdiction."[118] The Second Circuit reversed and remanded, holding that an interpretation of ERISA's provisions regarding exclusive federal jurisdiction presents a federal question that should be resolved by the federal judiciary and that federal court abstention was not appropriate.[119]

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[111] *Id.* at 1278-79.

[112] *Id.* The court used the analysis in Schatle v. International Alliance, T.S.E., 182 F.2d 158, 164 (9th Cir.), *cert. denied,* 340 U.S. 827 (1950).

[113] 565 F.2d at 1278-79.

[114] 555 F.2d 680 (2d Cir. 1977).

[115] *Id.* at 681.

[116] *Id.*

[117] *Id.* at 682.

[118] *Id.*

While ERISA's prospectivity can be the basis for finding a lack of federal jurisdiction, a recent decision illustrates that the nature of the plan at issue can require the same result. In *Murphy v. Inexco Oil Co.*,[120] an employee brought an action for violation of ERISA, alleging in part that his employer's oil and gas royalty pool for employees was a pension plan subject to federal regulation under ERISA.[121] The defendant-employer contended that the plan was a gratuitous form of current supplemental compensation or "bonus plan" not covered by ERISA, even though the plan incidentally provided employees with retirement income.[122] The court agreed with the defendants, citing Labor Department Regulations excluding from ERISA payments made to employees as bonuses for work performed where such payments are not systematically deferred to provide retirement income.[123] The court stated that a plan funded by oil royalties was by nature speculative and uncertain and inherently inconsistent with ERISA's purpose of insuring employee financial security at retirement. The court then held that it lacked jurisdiction to hear the employee's claim since the plan in dispute was not a pension plan under ERISA.[124]

In essence, ERISA's jurisdictional grant is quite broad, and jurisdiction will be found to be lacking only in unusual circumstances.

C. *Venue, Process, and Statute of Limitations*

The statutory venue provisions for civil litigation under ERISA are extremely broad. An action may be commenced "in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found."[125] The broad provisions were enacted despite fears expressed before ERISA's passage that they could unduly burden large institutions serving as plan fiduciaries for multistate plans.[126]

A restriction of considerable potential, however, was placed on ERISA's venue provisions in *Ewton v. Employees' Profit Sharing Re-*

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[119] *Id.* at 682-84.

[120] 427 F. Supp. 1015 (S.D. Tex. 1977).

[121] *Id.* at 1016.

[122] *Id.* at 1016-17.

[123] *Id.* at 1017. The court relied on the Department of Labor regulation excluding most bonus programs from ERISA coverage. *See* 29 C.F.R. § 2510.3-2(c) (1975).

[124] 427 F. Supp. at 1017-18.

[125] 29 U.S.C. § 1132(e) (2) (1976).

[126] *See Hearings on H.R. 2 and H.R. 462 Before the Subcomm. on Labor of the House Comm. on Education and Labor,* 93d Cong., 1st Sess. 775 (1973) (written statement of Employee Trusts Committee of the Corporate Fiduciaries Association of Illinois).

tirement Plan of Hubbard.[127] In this case, a national bank was named codefendant in an ERISA action commenced in the southern district of Florida as a trustee of the plan under suit. The bank was located exclusively in Houston, Texas, and had no connection with southern Florida other than as trustee for the pension fund.[128] Under the venue provisions in ERISA the suit was properly filed in Florida, but the bank moved to dismiss for improper venue, arguing that venue in an action against a national bank is controlled by the more restrictive venue provisions contained in the National Bank Act.[129] The court recognized that pension and profit sharing plans covered by ERISA often utilize institutional trustees and that enforcement of some ERISA claims would be made more difficult by the application of the restrictive bank venue provisions.[130] Nevertheless, the court dismissed the action for improper venue, stating that the more restrictive venue sections control where a national bank is a defendant.[131] Since institutional trustees of large or multistate pension plans are frequently national banks, the interpretation of venue in *Ewton* will have a restrictive effect in many suits filed under ERISA.

The Act also provides for nationwide service of process. Service may be made in any district where a defendant is found or resides.[132] Service on a plan being sued "as an entity" is accomplished by service upon a single trustee or administrator of the plan.[133] Where a plan has not designated an agent for the service of legal process, service may be made upon the Secretary of Labor, who has fifteen days after receipt of service to notify the plan administrator or trustee.[134]

ERISA's statute of limitations applies to actions for breach of a fiduciary duty and provides that such actions must be commenced within (a) six years after the last date of the breach or, in the case of an omission, after the last date the fiduciary could have remedied the breach,[135] or (b) three years after the date the plaintiff first had actual knowledge of the breach or a report was filed with the Secretary of Labor from which the plaintiff could have obtained such knowledge.[136] In the case of fraud or concealment of the breach, an action may be commenced within six years after the date the breach or violation is discovered.[137]

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[127] 416 F. Supp. 1055 (S.D. Fla. 1976).

[128] *Id.* at 1056.

[129] 12 U.S.C. § 94 (1970) provides:

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

[130] 416 F. Supp. at 1057.

[131] *Id.*

[132] 29 U.S.C. § 1132(e) (2) (1976).

[133] *Id.* § 1132(d) (1).

[134] *Id.*

[135] *Id.* § 1113(a) (1).

D. *Exculpatory Clauses, Bonding, and Insurance*

An important aspect of ERISA is its elimination of exculpatory clauses from pension and retirement plans.[138] The Act invalidates the trustee exculpatory clauses frequently found in pre-ERISA plans. Any provision that purports to relieve a fiduciary from responsibility or liability for any duty or obligation under the Act is void as against public policy.[139]

While fiduciaries may not be relieved of liability by exculpatory clauses, they may be indemnified by liability insurance or, in certain cases, indemnity agreements. The Act expressly provides that a plan may purchase insurance for its fiduciaries or for itself to cover liability for losses arising by reason of fiduciary acts or omissions.[140] Similarly, such insurance may be purchased by the fiduciary himself,[141] or by his employer or employee organization.[142] As of now, the construction afforded ERISA fiduciary and trustee liability insurance policies remains unsettled.[143] The basic intent of the Act, however, is accomplished by insurance provisions that afford plan participants and beneficiaries a solvent and accessible source of recovery in the event of plan violations. Questions about who will bear the ultimate liability and expense for such violations will be determined as case law develops.

The Department of Labor has indicated by Interpretive Bulletin that, although exculpatory clauses are void, in some cases indemnification agreements may be valid. Agreements that do not relieve a fiduciary of responsibility or liability, but merely permit another party, such as the employer or union, to satisfy the liability in the same manner as insurance may be valid depending on the circumstances of the case.[144]

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[136] *Id.* § 1113(a) (2).

[137] *Id.* § 1113(a).

[138] *Id.* § 1110. The elimination of exculpatory clauses and the opening of the courts to jurisdiction for suits by participants have been called the "twin features of ERISA" causing a move towards professionalism in the administration and management of retirement plans and their assets. Klevan, *Fiduciary Responsibility Under ERISA's Prudent Man Rule: What Are the Guideposts?*, 44 J. Tax. 152, 154 (1976).

[139] 29 U.S.C. § 1110(a) (1976).

[140] *Id.* § 1110(b) (1).

[141] *Id.* § 1110(b) (2).

[142] *Id.* § 1110(b) (3).

[143] No cases were found interpreting the insurance provisions of ERISA.

[144] *Department of Labor Interpretive Bulletin* 75-4, 40 Fed. Reg. 31598, 31599 (1975).

ERISA's bonding provisions require that every plan fiduciary and any person who handles plan funds or property be bonded.[145] The Act further provides that it is unlawful for any plan official to deal with plan assets unless he is bonded.[146] The amount of the bond, which must be fixed at the beginning of each fiscal year, cannot be less than ten percent of the plan assets handled; however, in no case can the required bond be more than $500,000 or less than $1,000.[147]

E. *Preemption*

1. State Law

As pension plans became increasingly interstate in scope, state courts became less desirable forums for pension litigation. One problem was the seemingly endless conflict of law questions arising from litigation involving multistate plans.[148] Problems created by varying state fiduciary duty requirements added to the confusion and engendered the need for creation of uniform nationwide standards.[149] Congress responded to these problems by inclusion of broad preemptive provisions in ERISA.

State pension law is now expressly preempted with regard to any cause of action under ERISA arising after January 1, 1975, the Act's effective date.[150] State law regulating insurance, banking, and securities is not preempted by ERISA. A state may not, however, deem a pension plan "to be an insurance company or other insurer, bank, trust company, or investment company" for purposes of state law.[151] The rationale for ERISA's broad preemptive characteristics is to promote uniformity in the enforcement of pension rights and to aid administrators and participants in predicting the legality of proposed actions without reference to varying state laws.[152]

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[145] 29 U.S.C. § 1112(a) (1976).

[146] *Id.* § 1112(b).

[147] *Id.* § 1112(a).

[148] *See* Cummings, *Purposes and Scope of Fiduciary Provisions Under the Employee Retirement Income Security Act of 1974*, 31 Bus. Law. 15, 28 (1975).

[149] Donaldson, *The Use of Arbitration to Avoid Litigation Under ERISA*, 17 Wm. & Mary L. Rev. 215, 228-29 (1975); *see* 29 U.S.C. § 1001 (1976) (policy statement for enactment of ERISA).

[150] 29 U.S.C. § 1144(a), (b) (1) (1976); *see, e.g.*, Hurn v. Retirement Fund Trust of the Plumbing, Heating and Piping Indus., 424 F. Supp. 80, 82 (C.D. Cal. 1976) (state tort theories of damages pre-empted); Anderson v. Abex Corp., 418 F. Supp. 5, 7 (D. Vt. 1975) (ERISA inapplicable to action alleging breach of fiduciary duty before January 1, 1975), *aff'd mem.*, 539 F.2d 703 (2d Cir. 1976). Whether the cause of action arose before or after ERISA's effective date is not always a simple question. *See, e.g.*, Keller v. Graphic Sys. of Akron, Inc., 422 F. Supp. 1005, 1008 (N.D. Ohio 1976) (employment terminated before ERISA's enactment yet cause of action arose after enactment).

[151] 29 U.S.C. § 1144(b) (2) (A), (B) (1976).

The result of ERISA's preemption of state law will be the development of an entirely new body of federal common law governing pension litigation. As the Second Circuit recently stated, "[T]he direction implicit in [ERISA's preemptive provisions] superseding state laws, [is] for the federal courts to develop a federal common law."[153] This view fits comfortably with the remarks of Senator Javits speaking on behalf of the conference version of ERISA. "It is . . . intended that a body of Federal substantive law will be developed by the courts to deal with the issues involving rights and obligations under private . . . pension plans."[154] There are as of now very few cases interpreting ERISA's state preemption provisions.

One of the earlier cases interpreting the state preemption provisions is *Azzaro v. Harnett,*[155] in which New York was enjoined from exercising supervision over a union pension fund. The New York State Insurance Department, pursuant to state law, sought information concerning the status of pension benefits in the fund.[156] The union trustees brought an action in the district court to enjoin the state's inquiry and for a declaratory judgment that state law had been preempted.[157] The state maintained that ERISA's preemption provisions did not apply to the union's fund since most of the members had earned their pension credits before the Act's effective date.[158] The court entered summary judgment for the plaintiffs, holding that state law had been preempted because the information sought by New York dealt with the "present status" of pension benefits.[159] The court characterized the states as having "essentially a cleanup role" with respect to pension litigation after ERISA's preemption.[160] On appeal, the Second Circuit affirmed the district court's decision and a petition for certiorari to the United States Supreme Court was denied.[161]

Seemingly opposite results were reached in two recent decisions interpreting ERISA's provisions excluding state regulations governing insurance, banking, and investments from preemption. In *Hewlett-*

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[152] S. Rep., *supra* note 3, at 29, U.S. Code Cong. & Ad. News at 4865.

[153] Riley v. MEBA Pension Trust, 570 F.2d 406, 413 (2d Cir. 1977); *cf.* Note, *The Federal Common Law,* 82 Harv. L. Rev. 1512, 1522 (1969).

[154] 120 Cong. Rec. 29942 (1974).

[155] 414 F. Supp. 473 (S.D.N.Y.), *aff'd mem.,* 553 F.2d 93 (2d Cir.), *cert. denied,* 98 S. Ct. 91 (1977).

[156] *Id.* at 473.

[157] *Id.* at 473-74.

[158] *Id.* at 474.

[159] *Id.* at 475.

[160] *Id.*

[161] Azzaro v. Harnett, 553 F.2d 93 (2d Cir.), *cert. denied,* 98 S. Ct. 91 (1977).

Packard Co. v. Barnes,[162] the Ninth Circuit held that California's "Knox-Keene" Act was preempted by ERISA. "Knox-Keene" served to regulate health care insurance plans in the state and had provisions concerning funding, disclosure of benefits, and quality of services.[163] Certain California employers who maintained health-care plans for their employees initiated an action to enjoin the state from requiring them to comply with Knox-Keene. The plans involved were self-funded and provided for reimbursement for eighty percent of medical expenses incurred by participating employees.[164] Rejecting the state's argument that Knox-Keene falls within the preemption exception regarding state insurance regulation, the court held that these plans were covered by ERISA and thus state law was preempted.[165] The court relied on ERISA's qualification to the preemption exception or the "deemer clause" to justify its holding and stated that plans covered by ERISA cannot "be considered to be in the business of insurance for purposes of the exception to preemption."[166] The court also rejected the state's assertion that if ERISA were found to be preemptive of Knox-Keene then the Act is unconstitutional under the tenth amendment as an unauthorized exercise of Congress's commerce power.[167]

A decision that is seemingly at odds with *Hewlett-Packard* is *Wadsworth v. Whaland*.[168] In that case, the First Circuit held that ERISA did not preempt a New Hampshire law regulating the content of group health insurance policies. The New Hampshire law required the "issuers" of group health insurance policies to include treatment for mental illness and emotional disorders in the insurance coverage.[169] The administrators of various employee trusts, which provided benefits mainly through the purchase of group health insurance, sought to enjoin New Hampshire from requiring compliance with state law. The plaintiffs argued that ERISA's preemption provisions prohibit direct or indirect regulation of employee benefit plans, citing the "deemer clause," which prohibits plans covered by ERISA from being considered to be in the business of insurance for purposes of preemption.[170] The court rejected this interpretation of the Act, holding that the deemer provision "does not prohibit a state from indirectly affecting plans by regulating the contents of group insurance policies purchased by the plans."[171]

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[162] 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir. 1978).

[163] 425 F. Supp. at 1297.

[164] *Id.* at 1295.

[165] 571 F.2d at 504.

[166] *Id.*

[167] *Id.*

[168] 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 98 S. Ct. 887 (1978).

[169] 562 F.2d at 72.

[170] *Id.* at 75-76. The plaintiffs based their assertion regarding ERISA's bar to direct or indirect regulation on the deemer clause definition of "state," *see id.* at 76 n.31, as including "a State, any political subdivision thereof, or any agency . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 29 U.S.C. § 1144(c) (2) (1976).

Although *Wadsworth* and *Hewlett-Packard* contain opposite results regarding ERISA preemption of a state insurance law, they can be viewed as conceptually consistent. *Hewlett-Packard* dealt with a California law that regulated the reporting and disclosure requirements of state health insurance policies, requirements that are also addressed by ERISA.[172] By contrast, *Wadsworth* was concerned with a law that, unlike ERISA, dealt with the substance of health insurance policies. Neither *Hewlett-Packard* nor *Wadsworth* explicitly interpreted the deemer clause to allow state insurance regulation of health plans where the law does not overlap ERISA's provisions, but at least two federal district courts have done so.[173] Another court has suggested that ERISA's preemption provisions might not be applicable where state law imposes higher obligations than ERISA.[174] This view could also serve to reconcile *Wadsworth* and *Hewlett-Packard,* though neither case mentions it.

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[171] 562 F.2d at 78. The court rejected the plaintiff's analysis of the deemer clause on the basis that "we would have to construe [§ 1144] without its savings clause pertaining to state regulation of insurance." *Id.* This was the extent of the court's technical rationale for its statutory interpretation. *See id.*

[172] 29 U.S.C. §§ 1021-1031 (1976) (disclosure and reporting requirements for employee benefit plans).

[173] Hamberlin v. VIP Ins. Trust, 434 F. Supp. 1196, 1200 (D. Ariz. 1977) (citing Insurers' Action Council, Inc. v. Heaton, 423 F. Supp. 921 (D. Minn. 1976)). In *Heaton*, the court held that Minnesota's Comprehensive Health Insurance Act of 1976 was not preempted by ERISA on the following rationale:

> [The preemption provision] provides that with a very narrow exception, ERISA should not be construed to relieve any person from any state law regulating insurance, banking, or securities. Thus, the conflict between the challenged state insurance law and ERISA has to be very clear in order to trigger the preemption provision. The only substantive parts of ERISA which relate to health and accident insurance are the reporting and disclosure provisions. These requirements have nothing to do with the substance of the insurance plans which employers must offer employees.

Id. at 926. *Hewlett-Packard* seemingly rejected the *Heaton* rationale based on nonoverlaps with ERISA in its review of ERISA's legislative history. *See* Hewlett-Packard Co. v. Barnes, 425 F. Supp. 1294, 1298-1300 (N.D. Cal. 1977) (analysis of legislative history), *aff'd,* 571 F.2d 502 (9th Cir. 1978). The original House version of the preemption provisions restricted preemption of state law to those laws which overlap with ERISA. 425 F. Supp. at 1298. However, as the court noted "more sweeping and precise language . . . was developed in conference committee." *Id.* The *Hewlett* Court concluded that "the committee intended preemption just as broad as the statute's language suggests." *Id.*

Curiously, *Wadsworth* more explicitly rejects the *Heaton* interpretation. The court, in discussing ERISA's legislative history regarding preemption, stated, "Congress . . . clearly rejected a concept of preemption limited to a conflicting or duplicate state law, in favor of applying the principle in its 'broadest sense.' " Wadsworth v. Whaland, 562 F.2d 70, 77 (1st Cir. 1977), *cert. denied,* 98 S.Ct. 887 (1978). *Wadsworth,* however, reached a result that *Heaton* compels based on a novel theory that ERISA's deemer clause permits "indirect" regulation of benefit plans by state insurance laws. *See id.* at 78.

ERISA's preemption provisions mean that the Mississippi lawyer will no longer be able to rely on state law precedent, but must look to the newly developing body of federal substantive law.

2. Federal Law

ERISA explicitly provides, with one major exception, that existing federal law is not affected by its enactment.[175] The Welfare and Pension Plan Disclosure Act has been repealed by ERISA except for causes of action arising under it prior to ERISA's effective date. A few of the Act's provisions, however, have been directly incorporated by ERISA.[176] A significant case interpreting the federal law preemption provisions in ERISA is *Daniel v. International Brotherhood of Teamsters.*[177] In *Daniel,* the Seventh Circuit held that ERISA does not preempt the antifraud provisions of federal securities laws. The suit was brought by a union member when he was denied benefits after twenty years participation in the union's fund. The member alleged misrepresentation and securities fraud in the union's handling of the fund.[178] The court first held that the pension plan at issue was a "security" under federal law because it was an "investment contract."[179] Next, the court stated that a union member's acquisition of interest in the pension plan was a "sale" to which the anti-fraud provisions of federal law apply.[180] The court held that ERISA does not preempt the antifraud provisions of federal law, stating that "preemption may only be declared in the face of an explicit repealer provision or the most cogent repugnancy between the securities and pension regulatory schemes."[181] The court also held that the traditional SEC refusal to regulate disclosure requirements of pension plans did not compel the conclusion that pension plans should be exempted from the antifraud provisions.[182]

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[174] *See* Nedd v. United Mine Workers of America, 556 F.2d 190, 205, 205 n.31 (3d Cir. 1977) (statutory "construction might result in the establishment of federal minimums of fiduciary conduct with state law remaining operative when it imposed higher obligations"), *cert. denied,* 98 S. Ct. 727 (1978).

[175] 29 U.S.C. § 1144(d) (1976) provides: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law."

[176] *Id.* § 1031 (provides for repeal of WPPDA and substitution of "ERISA" for "WPPDA" in scattered sections of the U.S. Code).

[177] 561 F.2d 1223 (7th Cir. 1977), *reversed,* 47 U.S.L.W. 4135 (1979).

[178] 561 F.2d at 1225-27.

[179] *Id.* at 1230-31. The court interpreted "security" as defined in the Security Act of 1933, 15 U.S.C. § 77b(1) (1976), and as defined in the Securities Exchange Act of 1934, 15 U.S.C. § 78c (a) (10) (1976).

[180] The major anti-fraud provisions of the federal securities laws are contained in section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), Rule 10b-5 of the Securities Exchange Commission, 17 C.F.R. § 240. 10b-5 (1977), and section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a) (1976). *See* 561 F.2d at 1229-30 (same).

The *Daniel* decision means that pensioners have an additional federal cause of action to enforce their rights where securities fraud is involved. It also means that those pensioners who have only a pre-ERISA cause of action may have a federal remedy. Concern has been expressed that security law applicability to pension plans may engender a reluctance of plan sponsors to maintain plans because of exposure to increased liability.[183] The SEC has taken the position that honest plan sponsors have nothing to fear since the antifraud provisions are only concerned with the making of false or misleading representations concerning plan provisions.[184] Whether *Daniel* remains undisturbed is yet to be seen, since the United States Supreme Court has granted certiorari in the case.[185]

IV. STATUTORY FIDUCIARY PROVISIONS

The key substantive sections of ERISA for the protection of pensioners are the Act's "fiduciary responsibility" provisions.[186] ERISA imposes on a broadly defined class of fiduciaries affirmative duties and specific prohibitions concerning plan administration and investment. Violation of the fiduciary duties or engaging in a prohibited transaction can result in both civil and criminal liability.[187]

A. *The Fiduciary Under ERISA*

ERISA defines a fiduciary as "anyone who exercises any discretionary authority or control with respect to the management of a plan or disposition of plan assets including anyone who renders investment advice for a fee or who has discretionary authority or responsibility in the plan's administration."[188] The Act requires that plans be set up "pursuant to a written instrument" and that one or more fiduciaries be named to administer and operate the plan.[189] Fiduciaries may designate persons other than themselves to carry out certain fiduciary responsibilities under the Act.[190] The broad statutory definition of "fiduciary," however, specifically includes persons so designated under the Act's civil liability provision.[191] Thus, fiduciaries under the Act can include plan sponsors, employers, their boards of directors and officers, investment advisors, or anyone else with discretionary authority. According to Solicitor of Labor, William J. Kilberg, the fiduciary responsibility provisions of ERISA affect to some degree "virtually everyone" with any relationship to the employee benefit plans.[192] Further, examples of potential "fiduciaries" include plan consultants, insurance agents, brokers, and lawyers and accountants working with the plan.[193]

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[181] 561 F.2d at 1246.

[182] *Id.* at 1247-48.

[183] Senator Harrison A. Williams, Jr., Chairman of the Senate Human Resources Committee voiced this concern in a letter to SEC Chairman Harold Williams. 4 PEN. PLAN GUIDE (CCH) ¶ 25,201.

[184] *See id.*

[185] *Daniel* was reversed after publication of this Article was substantially complete. *See* Daniel v. Int'l Bhd. of Teamsters, 47 U.S.L.W. 4135 (1979). The Supreme Court held that Daniel's pension plan was not an investment contract and that Congress did not intend to subject pension plans to federal securities law regulation. *Id.* at 4140.

[186] ERISA's fiduciary responsibility sections are contained in 29 U.S.C. §§ 1101-1114 (1976). These provisions apply to fiduciaries who handle pension plans and welfare benefit plans. *See id.* § 1101(a) (coverage extends to employee benefit plans); Wadsworth v. Whaland, 562 F.2d 70, 74 (1st Cir. 1977) (same), *cert. denied,* 98 S. Ct. 887 (1978).

[187] 29 U.S.C. §§ 1105, 1109, 1131 (1976) (sections outline civil and criminal penalties).

B. The Fiduciary Duties

The fiduciary responsibility sections of ERISA require that plan assets be held in trust and managed in accordance with the terms of a written instrument.[194] The Act further charges fiduciaries with specific affirmative duties and standards of care in their dealings with plans and plan assets. In essence, ERISA incorporates and expands the common law of trusts.[195] In interpreting the Act's fiduciary provisions, courts may look to common law precedent for guidance.[196]

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[188] 29 U.S.C. § 1002(21) (A) (1976) provides:

> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c) (1) (B) of this title.

[189] *Id.* § 1102.

[190] *Id.* §§ 1102(c) (2), 1105(c) (1) (B).

[191] *See id.* § 1002(21) (A) ("term includes any person designated under section 1105 (c) (1) (B)").

[192] Kilberg, *The Labor Department Prospective,* 31 BUS. LAW. 75, 76 (1975). *But see* Hibernia Bank v. International Bhd. of Teamsters, 411 F. Supp. 478, 489-90 (N.D. Cal. 1976) (bank which maintained account and prepared records for plan not fiduciary). For a discussion of this case, see text accompanying notes 80 through 86 *supra.*

[193] Kilberg, *supra* note 192, at 76.

[194] 29 U.S.C. §§ 1102(a) (1), 1103(a) (1976).

[195] Project, *supra* note 7, at 641.

There are three basic affirmative fiduciary duties under ERISA. The first requires that a fiduciary must carry out his responsibilities for the exclusive benefit of plan participants and beneficiaries.[197] Known as the "exclusive benefit rule," the concept has origins in pre-ERISA pension law. It has been, and is, the critical factor in determining whether a pension is to be considered a qualified trust under section 401 of the Internal Revenue Code.[198] The exclusive benefit concept, though not articulated as such, can also be found in the Welfare and Pension Plan Disclosure Act definitions of welfare benefit plan and pension plan.[199] Cases dealing with the concept under pre-ERISA federal statutes may provide reference points for the federal courts in interpreting ERISA's version of the rule.

The incorporation of the exclusive benefit rule bars the use of plan assets or personnel by the employer for corporate or personal purposes and so remedies one of the deficiencies of the common law trust theory as applied to pensions.[200] The rule also prohibits unauthorized use of plan funds by trustees, as evidenced by *Usery v. Wilson,*[201] one of the first cases brought under the rule. In that case, the Department of Labor filed suit against trustees of the Southern Labor Union Welfare Fund, alleging that the trustees had violated the exclusive benefit rule by loaning money to a related corporation and leasing an aircraft for the plan at an unreasonable rate.[202] It was also alleged that the fiduciaries violated the rule by permitting use of plan employees by entities other than the plan and failing to collect delinquent contributions to the plan.[203] The suit was settled by a consent order restoring losses to the plan and securing future compliance with ERISA.[204] Similarly, in *Norman v. ARCS Equities Corp.*,[205] it was held that the rule prohibits a fund trustee from maintaining litigation at the fund's expense "for the gratification of an animus . . . or for the aggrandizement of persons other than the trust itself."[206] The exclusive benefit concept makes actionable diverse examples of plan abuses not specifically addressed by ERISA[207] and is of major practical importance in pension litigation.

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[196] *Cf.* Morrissey v. Curran, 567 F.2d 546, 549 n.9 (2d Cir. 1977) (ERISA cannot be interpreted to erode common law fiduciary duty to timely sell improper investments).

[197] *See* 29 U.S.C. § 1104(a) (1) (1976) which provides:

> Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan . . . .

[198] *See* I.R.C. § 401 ("trust created . . . for exclusive benefit of . . . employees").

[199] *See* 29 U.S.C. § 302(a) (1), (2) (1976), repealed by 29 U.S.C. § 1031(a) (1) (1976).

[200] See text accompanying note 27 *supra.* ERISA's prohibited transactions section also accomplishes this result. *See* 29 U.S.C. § 1106(a) (1) (A)-(E), (a) (2) (describes prohibited transactions between plans and "parties in interest" who include employers). For a discussion of ERISA's provisions concerning prohibited transactions, see text accompanying notes 221 through 228 *infra.*

[201] 4 Pens. Plan Guide (CCH) ¶ 23,378A (Dec. 9, 1976) (filing of case), ¶ 23,170 (June 17, 1977) (consent decree).

[202] *Id.* ¶ 23,378A.

[203] *Id.*

The second affirmative fiduciary duty under ERISA is that a fiduciary must exercise the care of a reasonable prudent person in the administration of the plan and in dealing with plan assets.[208] This "prudent man rule" has been called by one court "the heart" of the fiduciary responsibility provisions.[209] The rule is derived from the prudent man concept developed in the American common law of trusts.[210] The common law standard of reasonableness was based on the reasonably prudent man handling his own property.[211] ERISA, by contrast, uses the standard of the reasonably prudent man acting as a specific plan's trustee.[212] This shift from the common law rule was thought necessary to provide trustees, who handle plans significantly more complex than personal trusts, the flexibility required for proper plan management.[213] ERISA's treatment of the prudent man rule was also designed so that the reasonableness standard would be determined on a case-by-case basis.[214] Whether the courts will take this approach remains to be seen since the first federal cases have dealt with abuses that would be actionable even under the more restricted common law view.[215]

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[204] *Id.* ¶ 23,170.

[205] 72 F.R.D. 502 (S.D.N.Y. 1976).

[206] *Id.* at 504.

[207] *Cf.* Marshall v. Snyder, 430 F. Supp. 1224, 1231-32 (E.D.N.Y. 1977) (union pension funds used to finance corporation with union ties and union members were fund's trustees and corporation's officers).

[208] 29 U.S.C. § 1104(a) (1) (B) (1976) provides that the fiduciary shall handle the plan "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

[209] Nedd v. United Mine Workers of America, 556 F.2d 190, 205 n.31 (3d Cir. 1977), *cert. denied*, 98 S. Ct. 727 (1978).

[210] *See* Williams, *The Prudent Man Rule of the Pension Reform Act of 1974,* 31 BUS. LAW. 99, 100-01 (1975) (posits rule's origins are in 1830 Massachusetts decision).

[211] Hutchinson, *supra* note 2, at 26.

[212] *See* 29 U.S.C. § 1104(a) (1) (B) (1976).

[213] *Hearings on H.R. 16462 Before the General Subcomm. of the House Comm. on Educ. and Labor,* 91st Cong., 1st & 2d Sess. 476-77 (1969-1970) (statement of Labor Secretary Shultz); Hutchinson, *supra* note 2, at 26.

[214] Huchinson, *supra* note 2, at 26-27.

[215] *See* Morrissey v. Curran, 567 F.2d 546, 548-49, 549 n.9 (2d Cir. 1977) (trustee did not dispose of improper investments within a reasonable time); Eaves v. Penn., 426 F.

The third affirmative fiduciary duty is that the fiduciary must diversify plan investments, thereby reducing the risk that a single loss will devastate plan assets.[216] Diversification is required, unless under the circumstances it is clearly imprudent.[217] ERISA sponsors envisioned placing the burden on the trustee to show diversification is undesirable whenever an exception to the requirement is sought.[218] The requisite degree of diversity is not stated in ERISA because of the necessity to accommodate investment flexibility in varying market conditions.[219] The Act's legislative history provides guidance to the trustee on this issue by listing various factors which should be considered.[220]

C. *Prohibited Transactions*

In addition to the affirmative fiduciary duties of the Act, certain transactions are specifically prohibited.[221] Included among the prohib-

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Supp. 830, 832-36 (W.D. Okla. 1976) (trustee used plan's assets to buy plan sponsor's corporation). For a detailed discussion of *Morrissey*, see text accompanying notes 99 through 103 *supra.*

[216] 29 U.S.C. § 1104(a) (1) (C) (1976) provides that a fiduciary must act for the exclusive benefit of the plan, and reasonably, by "diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so." A further requirement imposed by § 1104 is that the diversification be carried out "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter."

[217] *Id.*

[218] *See* H.R. CONF. REP. No. 1280, 93d Cong., 2d Sess. 304, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 5084-85.

[219] *See id.* at 304; U.S. CODE CONG. & AD. NEWS at 5084 ("prudent fiduciary must consider the facts and circumstances of each case").

[220] *Id.* at 304; U.S. CODE CONG. & AD. NEWS at 5084-85. The following factors are mentioned: "(1) the purposes of the plan; (2) the amount of the plan assets; (3) financial and industrial conditions; (4) the type of investment, whether mortgages, bonds or shares of stock or otherwise; (5) distribution as to geographical location; (6) distribution as to industries; (7) the dates of maturity." For a good discussion of ERISA's diversification requirements regarding investments made before the Act's enactment, see Project, *supra* note 7, at 645-49.

[221] 29 U.S.C. § 1106 (1976) provides:

> (a) Except as provided in section 1108 of this title:
>
> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> (B) lending of money or other extension of credit between the plan and a party in interest;
>
> (C) furnishing of goods, services, or facilities between the plan and a party in interest;

ited transactions are transactions between the plan and "parties in interest" as defined in the Act. "Parties in interest" include fiduciaries, persons providing services to the plan, any employer whose employees are covered by the plan, any employee organization whose members are covered, officers, directors, or owners of designated interests in certain corporations or organizations, or the relatives of any such individuals.[222] Additionally, a fiduciary is specifically prohibited from dealing with plan assets in his own interest and may not act on behalf of any party whose interests are adverse to those of the plan.[223] Similarly, a fiduciary may not receive any consideration for his personal account from parties dealing with the plan in connection with transactions involving plan assets.[224]

Initial federal decisions interpreting ERISA's prohibition of certain transactions evidence that the Act will have a remedial effect in a variety of factual settings involving trustee mismanagement.[225] *Marshall v.*

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

Congress also exempted a number of transactions in an effort "to prevent the disruption of established business practices." Project, *supra* note 7, at 654. These exemptions are contained in section 1108. 29 U.S.C. § 1108 (1976).

[222] 29 U.S.C. § 1002(14). The definition of party in interest contained in the text describes only a few of the parties which the highly complex definition covers.

[223] *Id.* § 1106(b) (1), (2).

[224] *Id.* § 1106(b) (3).

[225] *See, e.g.,* Hugh v. Old Home Manor, Inc., 419 F. Supp. 1019, 1020-21 (W.D. Pa. 1976) (trustee must compel employer to make timely payments to fund or be in violation of ERISA's prohibition on extending credit to a party in interest).

Synder[226] illustrates the wide variety of prohibited transactions a trustee might engage in and shows that ERISA can effectively remedy these situations. In a factually rich decision, the court held that certain transactions between a union pension fund and the union involving a wholly owned subsidiary of the plan were violative of the Act.[227] The court then enjoined the defendants from any further dealings and ordered a receiver appointed.[228]

D. Remedies for Fiduciary Breach of Duty

ERISA offers a wide range of remedies for breaches of its fiduciary provisions, including damages and equitable relief.[229] A fiduciary who breaches any of the fiduciary responsibilities may be personally liable to make good to the plan losses resulting from the breach. He may also be required to restore to the plan any profits made by him through the use of plan assets. Additionally, the fiduciary is subject to other equitable and remedial relief that a court may deem appropriate, including removal as a fiduciary. In essence, ERISA's provision defining a fiduciary's liability for breach allows a variety of potential alternatives, limited only by the facts of the case and the court's willingness to fashion creative relief.

An example of ERISA's provision in operation is found in *Eaves v. Penn,*[230] where the district court, having found substantial breaches, fashioned the type of broad relief the Act allows. Citing the pre-ERISA law of trusts as the proper guide, the court stated that the major thrust of the relief provisions of the Act is to protect the rights of plan beneficiaries.[231] With this in mind, the court held that the beneficiaries' position should be restored to that which they would have been in but for the dissipation of plan assets.[232] The court then ordered the total rescission of the transaction that had jeopardized the beneficiaries' interest and the removal of the offending fiduciaries.[233] Another example of creative remedies can be found in a district court decision ordering an injunction during the litigation of further plan payments to certain defendants and the appointment of a receiver to prevent dissipation of plan assets.[234]

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[226] 430 F. Supp. 1224 (E.D.N.Y. 1977).

[227] *See id.* at 1227-33 (chauffeur paid, office space rented, corporation bought, union officials made officers of corporation, conflict of interest by trustees).

[228] *Id.* at 1233-34.

[229] 29 U.S.C. § 1109 (1976) provides:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.
>
> (b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

[230] 426 F. Supp. 830 (W.D. Okla. 1976).

[231] *Id.* at 838 (citing RESTATEMENT (SECOND) OF TRUSTS §§ 205, 206 (1959)).

V. REPORTING AND DISCLOSURE

In ERISA cases, since much of the information vital to the plaintiff's case is often in the hands of defendants or third parties, the plaintiff must usually make extensive use of discovery procedures.[235] ERISA's own requirements of thorough reporting on the plans to both the IRS and the Department of Labor greatly facilitate this effort. Generally, within 120 days of the plan's becoming subject to these requirements, its administrators must file a detailed "plan description"[236] with the Department of Labor.[237] This document then becomes a matter of public record.[238] In addition, plan administrators must distribute a "summary plan description" to all participants and beneficiaries[239] and furnish, upon request, a more comprehensive exposition of the plan.[240] Similarly, most plans must file annual reports with the IRS and the Department of Labor.[241] As with the "plan description," a condensed version of these reports must be provided to all participants and beneficiaries and the full report must be provided upon request.[242] Other useful information the Act requires to be given to participants includes a summary of material modifications of the plan's terms,[243] and a written explanation of any denial of claims.[244]

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[232] 426 F. Supp. at 838.

[233] *Id.* at 838-39.

[234] Marshall v. Snyder, 430 F. Supp. 1224, 1233 (E.D.N.Y. 1977).

[235] Plan records and documents, although usually voluminous, often are the source of information enabling plaintiff to recreate accurately a record of the activities of defendants regarding their pension and retirement plan administration and management. Intelligent and extensive utilization of applicable state and federal discovery provisions, including production and inspection of plan records and documents, is often vital to plaintiff's case, as are depositions of administrators and other fiduciaries.

[236] *See* 29 U.S.C. § 1022(b) (1976) (lists information which plan description must include).

[237] *Id.* § 1022(a) (2).

[238] *Id.* § 1026(a).

[239] *Id.* § 1024(b).

[240] *See id.* § 1024(b) (4) which provides:

> The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the costs of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

[241] *See id.* § 1023 (describes when annual reports must be published); IRC § 6058(a) (same).

VI. Attorneys' Fees

A factor of critical importance to the practicality of ERISA civil litigation is the provision for award of attorneys' fees to the successful party. Congress, in response to the prospects of the high cost of litigation involving large plans or sponsors, gave the courts the power to award costs and attorneys' fees to the successful litigant.[245] While this power lies in the discretion of the court, the purpose and spirit of ERISA encourage the award of attorneys' fees to the successful ERISA litigant.

The court may order attorneys' fees paid either by the adverse party or from plan assets. Where equitable relief is awarded as a result of litigation to restore plan participants to their original position, the award has been ordered from plan assets.[246] Where the suit is for wrongful acts by fiduciaries, on the other hand, such as illegal spending of plan assets, the attorneys' fees should be borne by the offending fiduciaries rather than the plan fund.

The attorneys' fees provisions of ERISA have been compared to those of the Civil Rights Act of 1964[247] under which courts have liberally exercised their discretion to award attorneys' fees.[248] Guidelines for the proper award of attorneys' fees under the analogous Civil Rights Act stem from *Newman v. Piggie Park Enterprises, Inc.*[249] There the United States Supreme Court observed that the plaintiff in civil rights suits acts as a "private attorney general" vindicating a policy that Congress considered of the highest priority.[250] Congress enacted the provisions for counsel fees in civil rights litigation to encourage individuals to seek judicial relief.[251] The "private attorney general" concept is equally applicable for the enforcement of ERISA rights and the courts will probably exercise their discretion to award fees in meritorious ERISA actions. The provisions in the act for the allowance of attorneys' fees are an important part of ERISA's enforcement strategy. They will no doubt encourage private suits where ERISA violations in fact exist.

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[242] 29 U.S.C. § 1024(b), (b) (4) (1976).

[243] *Id.* § 1024(b) (1).

[244] *Id.* § 1133(1).

[245] *See* 29 U.S.C. § 1132 (g) (1976).

[246] *E.g.*, Eaves v. Penn, 426 F. Supp. 830, 838 (W.D. Okla. 1976).

[247] 42 U.S.C. § 2000a-36 (1976).

[248] Hutchinson, *supra* note 2, at 39 n.163.

[249] 390 U.S. 400 (1968).

[250] *Id.* at 402.

[251] *Id.*

Congress drafted the attorneys' fees provisions of ERISA to work both ways. Attorneys' fees may be awarded to the successful defendant as well as the successful plaintiff in ERISA litigation.[252] Thus, the effect of the ERISA provisions for the award of attorneys' fees will be to discourage frivolous suits as well as to encourage litigation in cases of meritorious claims.

VII. CONCLUSION

Civil litigation under ERISA affords wronged pensioners and other employee benefit plan participants an effective means of recourse for fiduciary abuses or benefit disputes. Although initial reactions to ERISA's civil litigation provisions were varied, experience has shown that the Act has brought to fruition the congressional desire to protect employees by investing them with enforceable rights regarding their benefit plans. ERISA's codification of fiduciary requirements and prohibited transactions impresses high standards on those involved with employee benefit plans. The jurisdictional and enforcement provisions open the federal courts to a wide range of parties for civil adjudication of fiduciary responsibility and benefit claims. The procedural provisions are easily complied with, thus favoring participants and beneficiaries. The reporting and disclosure provisions afford a valuable means of access to information regarding plans. The elimination of exculpatory clauses, and the retention of insurance and possible indemnification of fiduciaries remedy many of the problems unsolved by pre-ERISA pension law. The provisions for equitable relief give the courts the requisite flexibility to correct abuses in plan administration. The provisions for personal fiduciary and cofiduciary liability provide a means of solvent relief for wronged participants. In essence, the civil enforcement provisions of ERISA result in increased protection of employees, retirees, and beneficiaries whose personal futures depend on proper administration of their employee benefit plans.

It is important that every attorney in Mississippi be familiar with the general requirements and the civil litigation provisions of ERISA. Attorneys should be able to recognize situations where participants or beneficiaries have suffered as a result of violations of the Act. As the number of plans in Mississippi continue to multiply and violations arise more frequently, attorneys should be aware of the availability of recourse for the wronged.

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[252] See note 245 *supra*.

AWARD OF ATTORNEYS' FEES IN ADMINISTRATIVE PROCEEDINGS—IS IT IN THE PUBLIC INTEREST?

*William A. Mogel**

Judicial decisions and pending federal legislation have sought to liberalize the "American rule"[1] with regard to legal expenses incurred in federal litigation, especially in relation to the "public interest" cases. Indeed, one district court has stated, "It is not winners alone who contribute to society . . . . [T]he losing litigants are entitled to some consideration for their aid to the common weal."[2] Thus, the established American practice, which permits attorneys' fees only in limited instances, has been challenged. This raises important issues regarding the propriety of shifting litigation expenses in two different but related situations. The first—assessment against a private litigant—has been addressed by the United States Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society.*[3] The second—reimbursement by the federal government—is now the subject of pending legislation, Senate Bill 270.

In the United States federal courts, attorneys' fees generally are not awarded to the prevailing party in federal litigation except in two equitable instances. First, when the "losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons,' "[4] and, second, under the "common fund" or "common benefit" exception.[5] The Supreme Court also has sanctioned an award of attorneys' fees when "overriding considerations of justice seemed to compel such result."[6] Additionally, an award is permissible where authorized by statute[7] or provided by contract.[8] It now also appears clear that federal administrative agencies are barred from awarding attorneys' fees.[9]

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[1] In contrast is the "English rule," which provides for the award of attorneys' fees. In Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), the Court observed:

> As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation. Similarly, since 1607 English courts have been empowered to award counsel fees to defendants in all actions where such awards might be made to plaintiffs. Rules governing administration of these and related provisions have developed over the years. It is now customary in England, after litigation of substantive claims has terminated, to conduct separate hearings before special "taxing Masters" in order to determine the appropriateness and the size of an award of counsel fees. To prevent the ancillary proceedings from becoming unduly protracted and burdensome, fees which may be included in an award are usually prescribed, even including the amounts that may be recovered for letters drafted on behalf of a client.

Id. at 717.

[2] County of Suffolk v. Secretary of the Interior, 10 Envir. Rep. (BNA) 1938, 1938 (E.D.N.Y. October 26, 1977) (No. 75-C-208).

[3] 421 U.S. 240 (1975).

[4] F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974); *see* Vaughan v.

Notwithstanding this established precedent, there is a judicial trend, as well as pending federal legislation, to permit an award of attorneys' fees by both courts and federal administrative agencies when a party demonstrates that it promoted a beneficial public interest during the course of the litigation, or in the words of S. 270, the pending legislation, when the party "is an effective representative of an interest the representation of which contributes . . . to fair determination of the

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Atkinson, 369 U.S. 527, 530-31 (1962) (allowance of fees due to defendant's callous attitude).

[5] *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-97 (1970) (stockholder's suit benefited company and other stockholders); Trustees v. Greenough, 105 U.S. 527, 532-37 (1882) (trust fund preserved; plaintiff entitled to counsel fees from fund prior to its distribution).

[6] Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (exception recognized but not applied). Courts have also awarded attorneys' fees when an action was frivolously brought, *e.g.,* United States v. Certain Land in Squares, 532 & 570, 473 F.2d 94, 95 (D.C. Cir. 1972) (appeal lacking even faint hope of success); *accord,* Pine View Gardens, Inc. v. Jay's Frosted Foods, 299 A.2d 536 (1973). *See also* Vaughan v. Atkinson, 369 U.S. 527 (1962) (attorneys' fees awarded because of willful and oppressive conduct); Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951) (award of attorneys' fees in discrimination suit); *In re* Carico, 308 F. Supp. 815 (E.D. Va. 1970) (attorneys' fees awarded because of "frivolous harrassment").

[7] For examples of Federal statutes providing for the award of attorneys' fees, see Freedom of Information Act, 5 U.S.C. § 552a(g) (2)(B) (1976); Clayton Act, 15 U.S.C. § 15 (1976); Securities Exchange Act of 1934, 15 U.S.C. § 77(K)(e) (1976); Trust Indenture Act of 1939, 15 U.S.C. § 77www(a) (1976); Fair Labor Standards Act, 29 U.S.C. § 216(b) (Supp. V 1975); Water Pollution Prevention and Control Act, 33 U.S.C. § 928 (1970); Lanham Patent Act, 35 U.S.C. § 285 (1970); Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k) (1970); Clean Air Act, 42 U.S.C. § 1857H-2(d) (1970); Interstate Commerce Act, 49 U.S.C. § 16(2) (1970).

An award of attorneys' fees is not automatic, even if there is statutory authorization. *See, e.g.,* EEOC v. Christiansburg Garment Co., 550 F.2d 949, 951-52 (4th Cir. 1977) (successful defendant denied attorneys' fees under Civil Rights Act of 1964); Naprstek v. City of Norwich, 433 F. Supp. 1369, 1371 (N.D.N.Y. 1977) (attorney in successful challenge of municipal curfew ordinance not allowed fees; court not to encourage suits against outmoded ordinances on the expectation of automatic fees). *See also* Natural Resources Defense Council, Inc. v. EPA, 512 F.2d 1351, 1354-55 (D.C. Cir. 1975) (fees awardable under section 304 of Clean Air Act, but not under section 307).

[8] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975) (general rule stated, although fee contract not involved).

[9] Greene County Planning Bd. v. FPC, 559 F.2d 1227, 1240 (2d Cir. 1977) (en banc); Turner v. FCC, 514 F.2d 1354, 1356 (D.C. Cir. 1975).

proceeding."[10] In several instances where courts have awarded attorneys' fees, the requisite showing of a "public interest" was made in the context of environmental law cases,[11] where a well-known public interest group has opposed some industrial or governmental project.[12]

The view expressed in this Article is that the "American rule" should be adhered to in all instances and that attorneys' fees should not be awarded to a litigant advocating some public interest, either by judicial lawmaking or by amending the Administrative Procedure Act[13] to provide for an award to a party which has contributed to a "fair determination of the proceeding." If a court is forced to determine whether to award attorneys' fees against one litigant in favor of another, it is thrust beyond the ambit of its judicial function into political decision-making. This is the function of the Congress and not of the courts.[14] If an administrative agency is authorized to award attorneys' fees from the federal treasury, as proposed by S. 270, it will subvert the administrative process which relies upon each agency's staff's expertise to protect and promote the public interest. If it is this country's public policy to encourage the viability of environmental or public interest groups, it can be done either by direct governmental funding or by the encouragement of private donations. Courts and federal administrative agencies should not have to look to either a "well-financed" private litigant or to the federal treasury to fund litigation that, in many instances, seeks to delay or obstruct a project.

In light of the foregoing, this Article discusses: (1) the Supreme Court's *Alyeska* decision which eliminates the private attorney general theory as a basis of awarding attorneys' fees; (2) the Federal Power

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[10] S. 270, 95th Cong., 1st Sess. § 558a(d)(1) (1977).

[11] *See* Natural Resources Defense Council, Inc. v. EPA, 484 F.2d 1331, 1334 (1st Cir. 1973) (to allocate fees to plaintiff is to spread them ultimately among the public which benefits from the litigation); Sierra Club v. Lynn, 364 F. Supp. 834, 847-49 (W.D. Tex. 1973) (club's position analagous to plaintiff's in civil rights suit); La Raza Unida v. Volpe, 57 F.R.D. 94, 96 (N.D. Cal. 1972) (private action to enjoin construction of highway was in effectuation of strong congressional policy); Rich v. City of Benicia, 7 Envir. Rep. (BNA) 1439, 1441 (Cal. Super. Ct. 1974) (public interest by plaintiff's demand for environmental impact report).

[12] Washington Post, Dec. 22, 1977, § A at 11, col. 1.

[13] 5 U.S.C. § 551 (1970).

[14] Chief Judge Irving R. Kaufman in his concurring opinion in Greene County Planning Board v. FPC, 559 F.2d 1227, 1240 (2d Cir. 1976) stated: "The decision whether to expend public funds to advance an essentially private point of view by its very nature is political and, in a democracy, more appropriately made by the elected representative of the people."

Even for Congress, ascertainment of the public interest in certain instances, such as where there is a conflict between energy and the environment is difficult, complex, and never fully satisfactory. Mogel, *Energy and the Environment: Must There be a Choice?*, 13 CAL. W. L. REV. 1 (1976).

Commission's litigation experience and the United States Comptroller General's opinion on the payment of attorneys' fees; and (3) the current legislative proposal, S. 270, which seeks to authorize and fund awards of attorneys' fees in administrative proceedings.

I. THE LAW: *Alyeska*

The discontent with the American rule and the tentative move toward allowance of attorneys' fees based on a "public interest" theory were severely restrained by the Supreme Court's decision of *Alyeska Pipeline Service Co. v. Wilderness Society.*[15] The Wilderness Society and other environmental groups attempted to prevent the issuance of permits by the Secretary of the Interior to a pipeline company, thus obstructing the building of the trans-Alaska oil pipeline.[16] Although the plaintiffs' suit was unsuccessful, the court of appeals held that they had acted as a private attorney general to protect "important statutory rights of all citizens" and were entitled to an award of attorneys' fees.[17] Justice White, writing the Supreme Court majority opinion reversing the court of appeals,[18] reviewed the historical background and formulation of the American rule[19] and concluded that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation."[20] Explaining this decision, the Court stated:

> It appears to us that the rule suggested here and adopted by the Court of Appeals would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees . . . those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases. Nor should the federal courts purport to adopt on their own initiative a rule awarding attorneys' fees based on the private attorney general approach when such judicial rule will operate only against private parties and not against the Government.[21]

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[15] 421 U.S. 240 (1975).

[16] Wilderness Soc'y v. Morton, 495 F.2d 1026 (D.C. Cir. 1974) (en banc).

[17] *Id.* at 1032.

[18] Justices Douglas and Powell took no part in the consideration or decision of the case.

[19] 421 U.S. at 247-71. In his opinion, Mr. Justice White cited eight articles critical of the American rule. *Id.* at 270 n.45.

[20] *Id.* at 247.

[21] *Id.* at 269 (footnote omitted). In light of Mr. Justice White's statement, it is inter-

Thus, the Court in *Alyeska* dealt squarely with the issue of whether attorneys' fees should be shifted from unsuccessful environmental groups to successful private litigants, holding that there was neither a basis at law nor in equity to authorize the fee shifting.[22]

Justices Marshall and Brennan dissented, urging the award of attorneys' fees against Alyeska and advocating the following guidelines for determining whether allowance of attorneys' fees is appropriate:

> The reasonable cost of the plaintiff's representation should be placed upon the defendant if (1) the important right being protected is one actually or necessarily shared by the general public or some class thereof; (2) the plaintiff's pecuniary interest in the outcome, if any, would not normally justify incurring the cost of counsel; and (3) shifting that cost to the defendant would effectively place it on a class that benefits from the litigation.[23]

Justice Marshall also found significant the fact that Alyeska was a large company able to redistribute the additional cost, stating that "the ability to pass the cost forward to the consuming public warrants an award here."[24] Of the three criteria, the third is the least persuasive. In the context of the *Alyeska* litigation, it is unclear how the public benefited from the environmental litigation initiated by the various groups.

The *Alyeska* decision has clearly had a restraining effect on the judicial trend to shift responsibility for payment of attorneys' fees. Some courts have explicitly followed the holding, rejecting the private attorney general theory.[25] Nonetheless, disapproval of the decision has been

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esting to note Sierra Club v. Lynn, 502 F.2d 43 (5th Cir. 1974), which was decided before *Alyeska.*

> This circuit has never assessed attorneys' fees against a party innocent of any wrongdoing. In the absence of proof that the private party controlled the government agency's actions or caused its default, it cannot be cast in judgment as a result of the agency's shortcomings. The fact that the breach of duty involved was committed by one who is immune from liability for financial redress affords no basis for a shifting of fees. . . . The developer successfully defended this lawsuit. Its defense was not shown to have been unreasonable or to have unduly protracted this litigation. The district court was incorrect in proceeding from the premise that "attorneys' fees should be awarded unless the trial court can articulate specific reasons for a denial." . . . Another solution for future cases must come from Congress rather than in whole or half from the pocket of an innocent party.

Id. at 65-66 (footnotes omitted).

[22] 421 U.S. at 246.

[23] *Id.* at 284-85 (Marshall and Brennan, JJ., dissenting).

[24] *Id.* at 288.

[25] *E.g.,* Southeast Legal Defense Group v. Adams, 436 F. Supp. 891, 893-95 (D. Or. 1977) (attorneys' fees initially denied on *Alyeska* basis but subsequently awarded on basis of Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988 (1976)); Trinity Episcopal Schools Corp. v. Hills, 422 F. Supp. 179, 181-82 (S.D.N.Y. 1976) (plaintiffs failed to prove

expressed, even by courts following its precedent. For example, in *Rhode Island Committee on Energy v. GSA*,[26] the district court commented:

> In view of the valuable public service performed by plaintiffs and their counsel in commencing and ably prosecuting this action to compel agency adherence to NEPA, it is with regret that the Court concludes that it is without authority to award plaintiffs the attorneys' fees that they seek. Both the United States Supreme Court's unequivocal decision in Alyeska . . . and express prohibition of such an award in 28 U.S.C. § 2412 compel this conclusion.[27]

At least one court has refused to follow the holding, awarding attorneys' fees under the private attorney general theory to legal aid groups that successfully invalidated a state's school financing system.[28] Nevertheless, *Alyeska* significantly limited further judicial development of the "public interest" and "private attorney general" concepts as a means for assessing fees against private litigants.

II. ONE AGENCY'S EXPERIENCE: THE FEDERAL POWER COMMISSION

Alyeska did not address a critical issue closely related to awards of attorneys' fees against private litigants—whether fees incurred by a litigant in furtherance of a public interest should be reimbursed by the federal government. This problem is best illustrated by a series of cases—the *Greene County* litigation[29]—involving the Federal Power Commission's[30] approval of the construction of an electrical transmission line in New York. The *Greene County* cases represent the conflict of three public bodies—the commission, the Comptroller General, and the Court of Appeals for the Second Circuit—over the commission's authority to award attorneys' fees to an intervenor representing a public interest as well as its own interest. In the first case to reach the Second Circuit, the Federal Power Commission urged that it lacked statutory

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litigation conferred substantial benefits on local residents or bad faith on defendant's part).

[26] 397 F. Supp. 41 (D.R.I. 1975).

[27] *Id.* at 62-63.

[28] Serrano v. Priest, 20 Cal. 3d 36, 569 P.2d 1303, 1315, 141 Cal. Rptr. 315, 326-27 (1977). *See generally* Weinstein, *California's New Gold Rush*, 8 JURIS DOCTOR 8 (1978).

[29] Greene County Planning Bd. v. FPC, 559 F.2d 1227 (2d Cir. 1976), *cert. denied*, 98 S. Ct. 1280 (1978); Greene County Planning Bd. v. FPC, 528 F.2d 38 (2d Cir. 1975); Greene County Planning Bd. v. FPC, 490 F.2d 256 (2d Cir. 1973); Greene County Planning Bd. v. FPC, 445 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972).

[30] On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act, 42 U.S.C.A. § 7172(a) (West Supp. 1977), and Executive Order No. 12009, 42 Fed. Reg. 46267 (1977), functions of the Federal Power Commission were transferred to the Federal Energy Regulatory Commission (FERC), an independent commission within the Department of Energy.

authority to award attorneys' fees.[31] The Second Circuit accepted the commission's position, stating:

> [W]e perceive no basis in the terms of the provisions to extend the Commission's power to include paying or awarding the expenses or fees of intervenors. We would need a far clearer congressional mandate to afford the relief requested, especially in dealing with counsel fees, when Congress had not hesitated in other circumstances explicitly to provide for them when to do so was in the public interest.[32]

Subsequently, the Comptroller General issued an opinion regarding the commission and eight other federal administrative agencies, concluding that the agencies could use their appropriated funds to pay intervenor's attorneys' fees if the financial assistance were necessary to enable the agency to make a determination of the questions involved and the assisted party were unable to finance its participation.[33] Following the issuance of this opinion, the Second Circuit remanded the attorneys' fees question for further consideration by the Federal Power Commission.[34] Judge Van Graafeiland strongly dissented, finding no statutory authority for the Comptroller General's opinion:

> I can find no statute which empowers the Comptroller General to issue what is in effect a declaratory judgment clothing the Federal Power Commission with authority to disburse public funds, in the face of the Commission's own determination that it has no such power and this Court's finding in support thereof.
>
> We abdicate our responsibility when we treat an unsolicited interpretation by the Comptroller General as the equivalent of a Supreme Court ruling, and needlessly inject the Federal Courts into an area of administrative discretion when we compel the Federal Power Commission to conform its practices to what the Comptroller General opines are proper.[35]

The issue was finally resolved six years after the litigation commenced, when the Second Circuit held on rehearing en banc that the

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[31] Greene County Planning Bd. v. FPC (Greene County I), 455 F.2d 412 (2d Cir.), *cert. denied,* 409 U.S. 849 (1972). It is interesting to note that the Commission's successor, the Federal Energy Regulatory Commission, later asserted that the FPC's view was erroneous. *See generally* Washington Post, Mar. 27, 1978, § A at 2, col. 6. (commenting in part upon the intervention of Justice Department attorneys against the FPC in the *Greene County* appeal).

[32] Greene County Planning Bd. v. FPC, 455 F.2d 412, 426 (2d Cir.), *cert. denied,* 409 U.S. 849 (1972).

[33] SENATE COMM. ON COMMERCE, 95th Cong., 1st Sess., AGENCY COMMENTS ON THE PAYMENT OF REASONABLE FEES FOR PUBLIC PARTICIPATION IN AGENCY PROCEEDINGS 73-75 (Comm. Print. 1977).

[34] Greene County Planning Bd. v. FPC, 559 F.2d 1227 (2d Cir. 1976).

[35] *Id.* at 1235-37.

Federal Power Commission lacked authority to pay intervenors' legal fees. Judge Van Graafeiland, writing for the majority,[36] concluded:

> In light of the Supreme Court's very broad language in *Alyeska* that "absent statute or enforceable contract, litigants pay their own attorneys' fees," a finding that the Federal Power Commission is empowered to reimburse intervenors for their legal expenses must await appropriate Congressional action.[37]

In addition to the precedent of *Alyeska* and *Greene County I,* three other factors were of decisional significance. First, the commission, acting as the trier of fact, found that "[t]hese intervenors are protecting their own interests." Second, the ruling of the Comptroller General was not dispositive, since only a court has jurisdiction to interpret the commission's authority under the Federal Power Act. Third, the Federal Power Commission had never considered itself authorized to pay attorneys' fees, an interpretation "entitled to great deference."[38]

Judge Lumbard, speaking for the dissenters, felt that the decision was "an unfortunate step backwards":

> Public funding for public interest intervenors has become necessary to the optimal functioning of the administrative process. Involvement in administrative proceedings is time-consuming and expensive, and where individual interests are diffuse and noneconomic these costs are a substantial barrier to effective participation. When good citizens are willing to give their time and money to voice a broader public interest and thus to make useful contributions to government decisionmaking, there should be some means for reimbursing their reasonable attorneys' fees, expert witness costs, and other expenses. Otherwise, many good causes will be crippled because of financial limitations on presentation, and many others will go unpled.[39]

III. THE PENDING LEGISLATION: SENATE BILL 270

The *Greene County* decision has been the subject of attack by others. In response to the Second Circuit's decision, the acting Chairman of the New York Public Service Commission stated, "The absence of a well-funded intervention denies the judicial tribunal a very important source of information."[40] These cries for assistance for public interest intervenors have now been heard by the United States Senate, which is currently considering legislation that would permit administrative agencies to award attorneys' fees under certain circumstances.

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[36] Of the eight judges sitting en banc, Judge Van Graafeiland spoke for four, with Chief Judge Kaufman filing a concurring opinion and three judges dissenting. *Id.* at 1238-43.

[37] *Id.* at 1239-40 (quoting Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975)).

[38] 559 F.2d at 1238-39.

[39] *Id.* at 1243.

[40] Wall St. J., July 11, 1977, at 6, col. 4 (quoting Edward Berlin, acting chairman of the New York Public Service Commission).

Senate Bill 270, which is entitled the "Public Participation in Federal Agency Proceedings Act of 1977," was introduced on January 14, 1977, by Senator Edward M. Kennedy, who stated, "S. 270 . . . speaks to one overriding concern: Federal agencies simply cannot regulate in the public interest unless they ensure that the public itself has a direct and meaningful voice in agency proceedings."[41]

Senate Bill 270[42] seeks to amend chapters 5 and 7 of the Administrative Procedure Act,[43] to permit awards of reasonable attorneys' fees and other costs for public participation in federal agency rulemaking, ratemaking, licensing, and other adjudicatory proceedings "involving issues which relate directly to health, safety, civil rights, the environment, and the economic well-being of consumers in the marketplace."[44] Additionally, the Bill provides for the awarding of attorneys' fees and other enumerated expenses in federal judicial proceedings reviewing administrative agencies' orders.[45] The proposed legislation would be funded initially by a ten million dollar appropriation, which presumably would be divided among 1,250 federal agencies.[46]

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[41] *Hearings Before the Subcomm. on Administrative Practice and Procedure of the Comm. of the Judiciary*, 95th Cong., 1st Sess. 1 (1977) (statement of Senator Kennedy) [hereinafter cited as *1977 Hearings*]. The reader should be aware that S. 270 is currently back in committee and may be amended prior to being reported to the full Senate. All references to S. 270 in this article are to the bill as it was in February of 1978.

[42] S.270 is similar to the Kennedy-Mathias Bill, S.2715, 94th Cong., 1st Sess. (1975). This bill was reported from the Committee on the Judiciary, but was not acted upon by the full Senate. S. 2715 would have authorized federal agencies to make grants to allow citizens' groups to participate in the administrative process. Those funds could be used to hire attorneys and expert witnesses. Successful plaintiffs would be allowed to recover attorneys' fees in suits appealing federal administrative decisions. In connection with S. 2715, the Senate Judiciary Committee report stated that Senators James O. Eastland, Roman L. Hruska, Strom Thurmond, and William L. Scott offered minority views which asserted that S. 2715 is "an extremely broad bill with an enormous potential for abuse." S. Rep. No. 863, 94th Cong., 2d Sess. 51 (1976).

[43] 5 U.S.C. §§ 500-576 (1976); S. 270, 95th Cong., 2d Sess. 12 (1978).

[44] S. 270, 95th Cong., 2d Sess., Sec. 2(a), § 558a(c)(1) (1977). The alleged prototype of S. 270 is the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, tit. II, § 202(a), 15 U.S.C. 57a(h)(1) (1976). This act provides compensation for reasonable attorneys' fees, expert witness' fees, and other costs in rulemaking proceedings before the Federal Trade Commission. The following three criteria must be met in order that compensation for reasonable attorneys' fees be paid: (1) the party must represent an interest which would not otherwise be adequately represented in such proceeding; (2) the representation must be necessary for a fair determination of the rulemaking proceeding; and (3) such person must be "unable effectively to participate in such proceeding" because he cannot afford to pay the costs and fees. 15 U.S.C. § 576a(h)(1) (1976).

[45] S. 270, 95th Cong., 2d Sess., Sec. 3(a), § 707(b) (1978). Section 3 of S. 270 proposes to amend 5 U.S.C. Chapter 7, by adding a new § 707, which provides for award of attorneys' fees, expert witness' fees and costs, and litigation expenses in proceedings on

The heart of S. 270 is set forth in subsections (c) and (d) of section 558a, which provide:

> (c)(1) Each agency is authorized, in accordance with the provisions of this section, to award reasonable attorneys' fees, fees and costs of experts, and other costs of participation incurred by eligible persons in all rulemaking, ratemaking, and licensing proceedings, and in addition, to such other proceedings involving issues which relate directly to health, safety, civil rights, the environment, or the economic well-being of consumers in the marketplace.
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> . . . .
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> (d) Any person is eligible to receive an award under this section for participation (whether or not as a party) in any agency proceeding if—
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> (1) the person is an effective representative of an interest the representation of which contributes or can reasonably be expected to contribute substantially to a fair determination of the proceeding, taking into account . . .
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> (A) whether the interest is adequately represented by a participant other than the agency itself,
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> (B) the number and complexity of the issues presented,
>
> (C) the importance of public participation, in consideration of the need to encourage participation by representatives of segments of the public who, as individuals, may have little economic incentive to participate, and
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> (D) the need for representation of a fair balance of interest; and
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> (2)(A) the economic interest of the person in the outcome of the proceeding is small in comparison to the costs of effective participation in the proceeding by that person, or whenever the person is a group or organization, the economic interest of a substantial majority of the individual members of such group or organization is small in comparison to the costs of effective participation in the proceedings, or

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judicial review of agency actions in the federal courts. Section 707(b) establishes the standard which must be applied in deciding entitlement of such fees. A court must determine that such action served an important public purpose, that the economic interest of the person is small in comparison to the costs of participation, and that the person does not have sufficient resources available to participate in the action in the absence of an award. *Id.* § 767(b)(2), (3)(A), (3)(B).

[46] S. 270, 95th Cong., 2d Sess., Sec. 5(a), (b) (1978). *See generally 1977 Hearings,* (statement of Senator Allen), *supra* note 41, at 76.

> (B) the person does not have sufficient resources available to participate effectively in the proceedings in the absence of an award under this section.[47]

There are several problems with the foregoing language. First, the eligibility standard set forth in subsections (c) and (d) is imprecise and overly broad.[48] A term such as "can reasonably be expected to contribute substantially to a fair determination of the proceeding" is uncertain of meaning and will inevitably lead to controversy.[49] Thus, it has been pointed out that the bill will "create legal fee litigation wholly unrelated to public participation in agency proceedings."[50]

Moreover, if the purpose of S. 270 is to encourage public participation in agency proceedings, the requirement in subsections (d)(1)(C) and (2)(A) that an eligible party may have a small economic interest should be deleted. A party having any economic interest should not be eligible to be compensated for its attorneys' fees because such an allowance would subvert the purpose of the legislation.[51]

Another area of difficulty exists in the subsection (2)(B) requirement that, in order to be eligible for an award, a person must demonstrate that he "does not have sufficient resources available to participate effectively in the proceedings." No guidelines are provided for making such a determination.

There also has been criticism[52] of the portion of subsection (f), which provides that awards of attorneys' fees may be made prospectively as well as retroactively.[53] It has been suggested that:

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[47] S. 270, 95th Cong., 2d Sess., Sec. 558a(c), (d) (1978).

[48] *See generally 1977 Hearings* (statement of William Cuddy), *supra* note 41, at 116 (Cuddy criticizes the eligibility standard as being too broad, insofar as anyone who is made a party will then be deemed able to make a substantial contribution to the proceedings).

[49] *Id.* at 76 (statement of Senator Allen) (Allen asks what is meant by "reasonable"). It has been suggested that the eligibility standard be changed so that an applicant for compensation would have to establish that it represents an "interest which is necessary for a fair determination of the proceeding." *Id.* (statement of William Cuddy).

[50] *Id.* (statement of Senator Allen).

[51] *See generally id.* at 114 (statement of William Cuddy) (test should be whether the applicant has sufficient resources to participate effectively).

[52] *Id.*

[53] Sections 558a(f)(1) and (f)(2)(A), (B) provide:

> (f)(1) A person who receives advance payments pursuant to this section or who the agency determines to be eligible to receive a specified award pursuant to this section shall be liable for repayment of part or all of such payments actually received, or for forfeiture of part or all of the specified award for which such person is determined to be eligible, whenever the agency determines that the person clearly has not provided the representation for which the payments or specified award was made.
>
> (2) In any agency proceeding—-

> The awarding of financial assistance to persons only at the conclusion of a proceeding also would require them to demonstrate some degree of independent public support for their positions. We think that such a requirement would be a good practical touchstone for separating claims of significant interest from those of a limited or a questionable nature. It would also avoid the problem of how the Federal Government is going to recover advance payments from people whose claims to assistance are based on the absence of funds to begin with.[54]

The judicial review provision of S. 270 is also a problem because of the absence of a specific standard. Under subsection (g),[55] review may be sought by a person if he is denied an award or believes the award is insufficient, or where reimbursement of an award is sought. Such review is brought "in the appropriate court of the United States having jurisdiction of an appeal from the proceeding."[56] No criteria are set forth to aid a court in ascertaining whether, for example, the denial of an award was proper.

In addition to the foregoing problems with the language of the Bill, several persons, in testimony before the Senate Subcommittee on Ad-

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> (A) in which an eligible person acts in a manner demonstrating bad faith toward any other participant, and upon application by such other participant, the agency may rescind part or all of an award under this section to such eligible person, or
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> (B) in which any participant (other than an eligible person) acts in a manner demonstrating bad faith toward an eligible person, and upon application by such eligible person, the agency may require such participant to pay to the agency an amount equal to part or all of an award made to such eligible person under this section.

S. 270, 95th Cong., 2d Sess., Sec. 2(a), § 558a(f) (1978).

[54] *1977 Hearings* (statement of William Cuddy), *supra* note 41, at 115.

[55] Section 558a(g) provides:

> (g) A person who has applied for an award under this section may bring an action in accordance with chapter 7 of this title for review of a final agency action under this section—-
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> (1) denying an award, failing to make a determination, or failing to pay an award of fees or costs or both to such person, or
>
> (2) granting an amount of fees or costs, or both, which is insufficient to enable such person to participate or to continue to participate effectively in a proceeding, or
>
> (3) reimbursing an amount of fees or costs, or both, which is insufficient to compensate such person for its participation in such proceeding
>
> in the appropriate court of the United States having jurisdiction of an appeal from the proceeding in which such person participated or sought to participate, except that such appeal shall not be the basis for the court to enter an order to stay such proceeding. No person shall be entitled to intervene in any action brought under this section involving an application for an award by another person.

S. 270, 95th Cong., 2d Sess., Sec. 2, § 558a(g) (1978).

[56] *Id.*

ministrative Practice and Procedure, have made substantive objections. For example, the staffs of the various agencies might use S. 270 funds to supplement their budgets in order to further the staffs' views.[57] Second, the funds will contribute to agency backlogs and create delays because of the presence of agency funded counsel and experts.[58] Third, the funding of intervenors could create obstacles that will make government decision-making more difficult.[59] Fourth, the Bill will increase the costs of litigation.[60]

The most cogent summary of reasons presented in opposition to S. 270 is in the testimony of Senator Allen. He points out that the Bill will be expensive, will not accomplish the goal of increased public participation, will improperly encourage litigation, and will allow intervention in proceedings of agencies with massive backlogs.[61]

IV. Conclusion

There can be no quarrel that broad and effective public participation in the decision-making processes of federal administrative agencies and courts is a worthwhile goal. However, neither the "deep pockets" of private defendants[62] nor the federal treasury, as proposed by S. 270, should be made the source of grants to fund litigation. Liberalization of the standard for awarding attorneys' fees, either by statute or by departure from the precedent established by *Alyeska,* will improperly encourage litigation.[63]

As Senator Allen has observed in his testimony in opposition to S.

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[57] *1977 Hearings* (statement of Calvin Collier), *supra* note 41, at 12-13.

[58] *Id.* at 74, 76 (statement of Senator Allen), 113 (statement of William Cuddy). *But see id.* at 95 (statement of William Coleman) (expert witnesses and competent counsel help expedite proceedings.)

[59] *Id.* at 124 (statement of David Graham).

[60] *Id.* at 113 (statement of William Cuddy).

[61] *Id.* at 73-81 (statement of Senator Allen).

[62] A seemingly contrary position was taken by Justice Marshall, who dissented in *Alyeska:*

> Alyeska, as a consortium of oil companies that do business in 49 states and account for some 20% of the national oil market, would indeed be able to redistribute the additional cost to the general public. In my view the ability to pass the cost forward to the consuming public warrants an award here.

Aleyska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 288 (1975) (Marshall, J., dissenting).

[63] Indeed, such a liberalization may encourage litigation in a manner traditionally prohibited by the law. "Maintenance" is defined as "promoting the litigation of another," Black's Law Dictionary 1106 (4th ed. 1951), while "champerty" is described as "a bargain to divide the proceeds of litigation between the owner of the liquidated claim and a party supporting or enforcing the litigation." *Id.* at 292. Although the proposed legislation does not technically fall within these categories, it is arguable that it does violate the spirit of the law that they represent.

270,[64] the rationale for awarding attorneys' fees is based upon the faulty premise that "[t]he public interest cannot be represented adequately by the Government and that . . . identified public interest groups, their lawyers, or their experts are the only members of our society who are truly able to ensure that Federal agencies act in the public interest."[65] If this observation is correct, the malady appears to be the quality of federal staff action. Consequently, the remedy is not to fund attorneys for outside groups, but to improve governmental staff performance.

In sum, the holding of *Alyeska* should be followed. Legislative attempts, such as S. 270, to expand the basis for awarding attorneys' fees should be discouraged. Litigation, even for noble purposes by public spirited groups, is not an end the federal government should encourage as an expensive crutch to the federal decision-making process.

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[64] *1977 Hearings, supra* note 41, at 73-81.

[65] *Id.* at 75.

THE PROPOSED MISSISSIPPI RULES OF CIVIL PROCEDURE— AN ARGUMENT FOR ADOPTION

*Guthrie T. Abbott**

By the time this Article is printed, each member of the Mississippi bench and bar should have received a copy of the *Proposed Mississippi Rules of Civil Procedure* (May, 1978 draft). The frank purpose of this paper is to encourage support for the adoption of these rules.

Although procedural reform of civil practice in Mississippi has been advocated for many years,[1] the only major legislative change in procedure since the mid-1800's[2] has been the passage of the discovery proceedings act in 1975.[3] Nevertheless, a sequence of events that started with the 1975 Mississippi Supreme Court decision of *Newell v. State*[4] gives Mississippi the opportunity to adopt a set of rules of civil practice and procedure that have been carefully drafted and tailormade for our state by an eminently qualified committee.

I. History of the Creation of the Advisory Committee on the Rules of Civil Practice and Procedure

The proposed rules[5] were created by a body called the Advisory Committee on the Rules of Civil Practice and Procedure.[6] Before looking at the makeup of this group and the methodology employed by it in creating the rules, an historical perspective is needed to obtain an accurate view of the current situation. The Mississippi Constitution of 1890 and its predecessors established a separation of powers between the legislative and judicial branches of government.[7] The judiciary was given a separate mandate by section 144 of the Constitution, which provides: "The *judicial power* of the state shall be vested in a Supreme Court."[8] In spite of this language, most of the rules of practice and procedure for courts in Mississippi have been established by legislative acts.

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[1] *See* Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform,* 43 Miss. L.J. 287, 287 n.3 (1972) (covers a list of articles spanning the past 35 years that have called for a reform of civil procedure in Mississippi).

[2] The controversy that erupted during this period by Mississippi's adoption of the 1848 New York Code in 1850 resulted in the reinstatement of common law pleading by the legislature in 1857. Griffith, *The New Mississippi Civil Practice Act—Its Background and Effect,* 20 Miss. L.J. 1, 6 (1948); Patterson & Patterson, *A Plea for Procedural Reform in Mississippi,* 42 Miss. L.J. 293, 294 (1971).

[3] Miss. Code Ann. §§ 13-1-201 to -243 (Supp. 1977).

[4] 308 So. 2d 71 (Miss. 1975).

[5] *See* Miss. Code Ann. § 9-3-69 (Supp. 1977) (giving Advisory Committee power to draft rules).

[6] *See id.* § 9-3-65, -67 (providing for Advisory Committee).

For eighty-five years following the adoption of our existing Constitution, many members of the bench and bar expressed dismay and concern over the antiquated and confusing morass of legislatively created court rules.[9] These expressions of concern, however, were usually directed toward specific procedural areas such as pleadings, third-party practice, and rules of evidence,[10] and, with rare exception,[11] the mode of reform suggested was further legislation. During the past decade, as most suggestions for procedural change were rebuffed by the legislature, the feeling of discontent among the members of the bar steadily increased. The most eloquent expression of the need for reform, together with a suggested mode for implementing change, was made by Lawrence J. Franck in a 1972 Article, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform,*[12] published in the *Mississippi Law Journal.* The Franck Article urged the Mississippi Supreme Court to reassert its inherent rulemaking power that had been dormant for so many years. The encouragement must have come at an appropriate time, for on January 27, 1975, the Mississippi Supreme Court issued its decision in *Newell v. State.*[13]

Directly contradicting sections 11-7-155 and 99-17-35 of the Mississippi Code,[14] the court in *Newell* held that a judge is not restricted to the jury instructions requested by the parties.[15] Citing section 144 of the Mississippi Constitution,[16] the court found there was "no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose."[17] Noting the constitutional provisions regarding the court's jurisdiction[18] and the oath required of the justices,[19] the court stated:

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[7] MISS. CONST. art. 1, §§ 1, 2.

[8] MISS. CONST. art. 6, § 144 (emphasis added).

[9] *See generally* Ethridge, *Improving the Machinery of Justice,* 37 MISS. L.J. 506 (1966); Fant, *Procedural Reform in Mississippi,* 34 MISS. L.J. 40 (1963); Franck, *supra* note 1; Patterson & Patterson, *supra* note 2; Triplett, *Hocus Pocus Legal Procedure,* 16 MISS. L.J. 9 (1943).

[10] Franck, *supra* note 1, at 303.

[11] Ethridge, *supra* note 9, at 508.

[12] Franck, *supra* note 1.

[13] 308 So. 2d 71 (Miss. 1975). For a thorough discussion of the *Newell* case and other cases serving as harbingers for the *Newell* decision, see 46 MISS. L.J. 849 (1975).

[14] MISS. CODE ANN. §§ 11-7-155, 99-17-35 (1972).

[15] 308 So. 2d at 78.

[16] MISS. CONST. art. 6, § 144 provides: "The judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this constitution."

> The above brings into focus the heart of the issue, and that is—what course the court shall follow in the event the laws enacted by the legislative department are not agreeable with the directives of the constitution. We believe no citation of authority is needed for the universally accepted principle that if there be a clash between the edicts of the constitution and the legislative enactment, the latter must yield.[20]

Although this noble pronouncement that the court should take the lead in procedural rulemaking is certainly a step in the right direction, there are pragmatic problems that make it difficult to effect comprehensive change. The most glaring problem is the inability of the court to appropriate funds for a research project to formulate the necessary rules. Perhaps evidencing its awareness of this problem, the *Newell* court stated:

> This requires the Court to draw upon its inherent power to prescribe rules of procedure to facilitate the administration of justice in the courts throughout the state. In doing so we *hasten* to say that as long as rules of judicial procedure enacted by the legislature coincide with fair and efficient administration of justice, the Court will consider them in a *cooperative spirit* to further the state's best interest . . . .[21]

Almost immediately after the court in *Newell* declared itself to be the final arbiter in relation to rulemaking, the Mississippi legislature reacted by enacting a set of statutes establishing a procedure for civil rulemaking.[22] This procedure requires action by both the court and legislature. The striking difference between the *Newell* approach and the new statutes is that in the latter the legislature purports to have regained final authority.[23] While it seems clear that the Mississippi Supreme Court has the power to declare this legislation unconstitutional based upon the rationale of *Newell*, the language from the decision, which speaks in terms of a "cooperative spirit,"[24] shows that the court is acutely aware of the economic problems that might result from such a direct clash with the legislative branch of government. Furthermore, the area of civil practice and procedure has become too complex to be dealt with in the ad hoc manner that results when the court deals with individual rules or cases as was done in *Newell.* The cases discussing *Newell* and implementing the court's recently announced power show the inadequacy of a piecemeal approach to such a broad situation. In addition, the chance for sweeping reform through the sole use of the court's rulemaking power is materially lessened by the resistance of some members of the court to making other than minimal use of the power.[25] Although the court's opinions from *Newell* to date have dealt with isolated minor problems[26] rather than the major areas that have been criticized as needing reform, the ultimate result of this high-level struggle between the two branches of government may be the much needed comprehensive procedural reform of civil practice.

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[17] 308 So. 2d at 77.

[18] Miss. Const. art. 6, § 146 provides: "The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals."

[19] *Id.* art. 6, § 155.

[20] 308 So. 2d at 77.

[21] *Id.* at 78 (emphasis added).

[22] Miss. Code Ann. §§ 9-3-61 to -73 (Supp. 1977).

[23] *Id.* § 9-3-71.

[24] See text accompanying note 21 *supra.*

The legislative reaction[27] to *Newell* included a provision for the creation of a fourteen member Advisory Committee on the Rules of Civil Practice and Procedure in Mississippi.[28] Mississippi has been very fortunate to have a group of highly qualified, as well as keenly interested, members of the bench and bar[29] agree to undertake the task given to them by the legislature of making "a comprehensive and continuing study . . . of civil practice and procedure in the trial courts of this state"[30] and to "draft such rules pertaining thereunto as it concludes will simplify, improve and expedite the administration of justice."[31]

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[25] *See* Haralson v. State, 308 So. 2d 222, 225 (Miss. 1975) (rulemaking power should be used "sparingly").

[26] *See* Gillard v. Great S. Mortgage & Loan Corp., 354 So. 2d 794, 798-99 (Miss. 1978) (Sugg, J., dissenting) (advocates use of the court's rulemaking power to adopt a procedural rule which would cause plaintiffs filing suit in an improper venue to bear all costs of transfer to a county where venue is proper), *noted in* 49 MISS. L.J. (1978) (next issue); Brown v. City of Water Valley, 319 So. 2d 649 (Miss. 1975) (cites *Newell* as support for the court's adoption of Supreme Court Rule 44 dealing with a court reporter's ability to obtain an extension of time to complete the transcript); Scott v. State, 310 So. 2d 703 (Miss. 1975) (upholds constitutionality of Mississippi Circuit Court Rule 14 requiring pretrial filing of jury instruction).

[27] See text accompanying notes 22 & 23 *supra.*

[28] MISS. CODE ANN. § 9-3-65 (Supp. 1977) established the composition of the committee as follows:

> There shall be an advisory committee on the Rules of Civil Practice and Procedure, which shall consist of (a) a justice of supreme court, elected by the supreme court judges; (b) three (3) circuit judges, one (1) from each supreme court district, elected by the circuit judges of the entire state; (c) three (3) chancery court judges, one (1) from each supreme court district, elected by the chancellors of the entire state; (d) two (2) county court judges, elected by the county court judges; (e) three (3) resident practicing attorneys representing the various interests of the trial bar, selected by the commissioners of the Mississippi State Bar Association; and (f) two (2) other resident practicing attorneys of at least five (5) years' experience, selected by the supreme court.

[29] The PROPOSED MISSISSIPPI RULES OF CIVIL PROCEDURE III (1978) includes a list of persons serving on the Advisory Committee on Rules of Civil Practice and Procedure from the time of its creation until May, 1978.

The Advisory Committee, working together with its research counsel,[32] considered numerous approaches[33] to the project before agreeing that the most desirable method of modernizing and simplifying our system of civil procedure would be to adopt a comprehensive codification of rules governing all phases of civil litigation.[34] The decision of the Advisory Committee to make such a complete study and revision aligns Mississippi with the majority of states. Approximately thirty states have adopted procedural rules that are modeled after the Federal Rules of Civil Procedure but modified to retain some state practices and to borrow proven innovations from other jurisdictions.[35]

The methodology used by the Advisory Committee emulates the methodology used by many of the states that have previously effected procedural change in an orderly and well-received manner.[36] A brief description of the work of the Committee is given in the preface to the proposed rules as follows:

> Since July 1976 the Committee has held monthly meetings at which the rules and comments proposed by Research Counsel were studied, criticized, amended, and redrafted. As the comments accompanying the rules reflect, the Committee has endeavored to retain the best of current Mississippi procedural practices, to eliminate the worst, to add new procedural devices where none existed before—whether this meant modifying existing procedures or adopting totally new ones—and to compose it all into a succinct codification easily learned and transported.

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[30] MISS. CODE ANN. § 9-3-69 (Supp. 1977).

[31] *Id.*

[32] *Id.* § 9-3-67 authorizes the supreme court to employ and compensate such research counsel. The need for a full-time research counsel with supporting staff vividly illustrates why the supreme court, even with absolute rulemaking power, must have economic assistance from the legislature. Arlen B. Coyle has served as research counsel from the inception of this project.

[33] Interview with Arlen B. Coyle, Research Counsel for Advisory Committee at the University of Mississippi Law Center (August 28, 1978).

[34] PROPOSED MISSISSIPPI RULES OF CIVIL PROCEDURE I (1978).

[35] *See* Heflin, *Remarks of the Chief Justice, Symposium: The Alabama Rules of Civil Procedure,* 25 ALA. L. REV. 663, 664 (1973) (the Alabama Rules of Civil Procedure "were modified to take advantage of useful peculiarities of Alabama practice and proven innovations in other jurisdictions"). *See generally* Clausen & Lowe, *The New Wisconsin Rules of Civil Procedure: Chapters 801-803,* 59 MARQ. L. REV. 1 (1976); *A Symposium—The Massachusetts Rules of Civil and Appellate Procedure,* 59 MASS. L.Q. 113 (1974).

[36] *Cf.* Heflin, *supra* note 34, at 663-65 (traces the promulgation of the Alabama Rules of Civil Procedure).

> In July 1977 the Advisory Committee completed a preliminary draft of the proposed Mississippi Rules of Civil Procedure. That work was distributed to the state's judges, clerks of courts, secretary of state, attorney general, commissioner of insurance, bar officers, bar commissioners, county and regional bar associations, to the Mississippi Trial Lawyers Association and the Mississippi Defense Lawyers Association, and to the faculties of the University of Mississippi Law Center and the Mississippi College School of Law. Those recipients of the preliminary draft of the rules were requested to make the work available to the attorneys in their locales.[37]

During July and August of 1977 the Advisory Committee held a series of five open meetings around the state in order to disseminate information and receive suggestions concerning the proposed rules.[38] Although the turnout for these meetings was disappointingly light, several changes were made to the proposed rules in response to comments made at the hearings. At the time of these hearings, for example, the recently enacted rules of discovery[39] had been copied from the code into the proposed rules without change. However, since much discussion and criticism concerned discovery, the Advisory Committee was prompted to propose changes to the Mississippi Discovery Act. These changes were designed to "curb discovery abuses . . . while simultaneously protecting litigants from unfair surprise and safeguarding their right to complete development of factual issues."[40]

Before looking in more detail at other examples of needed change that would be effected by the proposed rules, it might be helpful to point out areas that will not be affected by adoption of the rules.

II. AREAS THAT WOULD NOT BE AFFFECTED BY ADOPTION OF PROPOSED MISSISSIPPI RULES OF CIVIL PROCEDURE

Although the proposed rules would obviously make many changes in the current methods of practice and procedure in Mississippi, it is important to keep in mind the many areas that would remain untouched. The structure of the court system is an excellent example with which to start.

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[37] PROPOSED MISSISSIPPI RULES OF CIVIL PROCEDURE I-II (1978).

[38] Open hearings were conducted at Jackson, July 29; Oxford, August 1; Greenwood, August 2; Hattiesburg, August 3; Biloxi, August 4. The hearings were transcribed, and the transcript is on file at the office of Arlen B. Coyle, Research Counsel to Advisory Committee, University of Mississippi Law Center, University, Mississippi 38677.

[39] MISS. CODE ANN. §§ 13-1-201 to -243 (Supp. 1977).

[40] Young Lawyers Section, Mississippi State Bar. Interim Report and Recommendation of the Committee on Mississippi Rules of Civil Procedure 6 (July 25, 1978).

Examples of such change are proposals which would limit discovery to the "issues" presented by parties' claims and defenses, rather than to the "subject matter" of an action, Miss. R. Civ. P. 26(b)(1) (May, 1978 draft), which would require leave of court to submit more than thirty interrogatories to a party, Miss. R. Civ. P. 33(a) (May, 1978 draft).

The original court system was established by the Mississippi Constitution,[41] and the county courts were added by the legislature pursuant to constitutional authority.[42] The proposed rules will do nothing to change the existing system with regard to both the courts themselves and their subject matter jurisdiction.[43] The substantive law regarding venue[44] and jurisdiction over the person will remain substantially unchanged.[45] Long-arm jurisdiction[46] is unaffected, and the appellate system will remain the same. The point of these comments is simply to highlight the fact that the proposed rules will truly occasion only procedural change while leaving the substantive body of law in Mississippi essentially undisturbed.

III. Examples of Beneficial Changes to be Brought About by Adoption of the Proposed Mississippi Rules of Civil Procedure

There are several major additions to Mississippi procedure, such as declaratory judgments[47] and third-party practice,[48] which would be brought about by adoption of the proposed rules. The adoption of these rules should not present any problems to Mississippi practitioners, since most have dealt with declaratory judgments and third-party practice through their work in federal courts.[49] This author endorses these two additions, although the scope of this Article will not permit a detailed discussion of the effect of adding these procedural tools. There are, however, many less sweeping but very important alterations to existing procedure that will facilitate practice upon adoption of the proposed rules, and a look at several of these emendations should be enough to convince most people of the need for their adoption.

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[41] Miss. Const. art. 6, §§ 144-177.

[42] *Id.* § 172.

[43] Miss. R. Civ. P. 82(a) (May, 1978 draft), provides, "These rules shall not be construed to extend or limit the jurisdiction of the courts of Mississippi."

[44] *See generally* 49 Miss. L.J. (1978) (next issue) (discussion of venue in Mississippi).

[45] For a discussion of a proposed change regarding venue that would be occasioned by Miss. R. Civ. P. 82(d) (May, 1978 draft), see Section III. G. *infra*.

[46] Miss. Code Ann. §§ 13-3-57, -63 (Supp. 1978).

[47] Miss. R. Civ. P. 57 (May, 1978 draft). For a general discussion of declaratory judgments, see 10 C. Wright & A. Miller, Federal Practice and Procedure §§ 2751-2771 (1973).

[48] Miss. R. Civ. P. 14 (May, 1978 draft). For an argument in favor of adoption of third-party practice in Mississippi, see Patterson & Patterson, *supra* note 2, at 313.

[49] 28 U.S.C. § 2201 (1970) deals with declaratory judgments by federal courts, and Fed. R. Civ. P. 14 discusses third party practice.

A. Problems Concerning Computation of Time

Existing case law and statutes in Mississippi have created an incredibly convoluted, confusing, and misleading situation with regard to when one must file pleadings or notices in order to comply with the stipulation by statute or rule of a certain number of days. The problem surrounds the treatment that should be given to Saturdays, Sundays, legal holidays, days in which the courthouse is legally closed (nonjuridical days), days on which the courthouse is closed without proper authority, and days on which the courthouse is open for business only a half day. This is an area of the law in which there should be as much clarity and certainty as possible since the results of a misunderstanding can be catastrophic.

The present confusion stems from section 1-3-67 of the Mississippi Code[50] as interpreted by cases such as *Parkman v. Mississippi State Highway Commission.*[51] The *Parkman* case dealt with a situation in which the terminal day for filing an appeal from a county court judgment fell on a Sunday. Logic and fairness would seem to dictate that the appellant should always be given until the next juridical day in such a situation, but the Mississippi Supreme Court in *Parkman* reaffirmed its position that in cases where Sunday is the terminal day, section 1-3-67 will be interpreted to require that the act be completed on the preceding Saturday.[52] The appellant in *Parkman* was saved by the fact that the courthouse was closed on the preceding Saturday by proper authority of the board of supervisors.[53] Thus, the court held the appeal to be perfected since it was completed on Monday following the terminal Sunday.[54]

The *Parkman* case intimates that if the terminal day were to fall on a legal holiday other than Sunday,[55] one would be allowed until the

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[50] MISS. CODE ANN. § 1-3-67 (1972) provides:

> When process shall be required to be served or notice given any number of days, the day of serving the process or of giving the notice shall be excluded and the day of appearance included; and in all other cases when any number of days shall be prescribed, one day shall be excluded and the other included. When the last day falls on Sunday, it shall be excluded; but in other cases Sunday shall be reckoned in the computation of time.

[51] 50 So. 2d 637 (Miss. 1971).

[52] *Id.* at 639.

[53] MISS. CODE ANN. § 25-1-99 (Supp. 1977).

[54] 250 So. 2d at 639.

[55] It is not difficult to find oneself unaware that a certain day is a legal holiday in Mississippi. *See* MISS. CODE ANN. § 3-3-7 (1972).

> The following are declared to be legal holidays, viz: the first day of January (New Year's Day); the third Monday of January (Robert E. Lee's birthday); the third Monday of February (Washington's birthday); the last Monday of April (Confederate Memorial Day); the first Monday of June (Jefferson Davis' birth-

next juridical day to complete his action,[56] although this conclusion is far from clear. In addition, if one finds that he has waited until an afternoon of a final day on which the courthouse or appropriate agency was open for business only in the morning, current case law indicates that he will not be given another day,[57] and his only chance would be to attempt to contact the appropriate clerk or official outside of the official's office.[58] Further lack of clarity concerning final dates results from the statute's failure to mention the effect of a courthouse being closed without proper authority. The proposed rules will crystallize this murky area by treating all of the above situations in the same manner.[59]

An important lesson to be learned from the above example is that it is folly to await action by the legislature to cure the many problem areas such as computation of time. The confusion surrounding this area has been evident for many years, but the legislature has had little interest in dealing with isolated problems of court procedure, and even if it had, the result of such a piecemeal approach would more than likely prove highly unsatisfactory.

B. *Motions for a New Trial—Problems Concerning Time for Filing*

Under current Mississippi practice one must file a motion for a new trial[60] before the end of the term in which the judgment is entered. This

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> day); the fourth day of July (Independence Day); the first Monday of September (Labor Day); the eleventh day of November (Armistice or Veterans' Day); the day fixed by proclamation by the governor of Mississippi as a day of thanksgiving which shall be fixed to correspond to the date proclaimed by the President of the United States (Thanksgiving Day); and the twenty-fifth day of December (Christmas Day). Provided, however, that in the event any holiday hereinbefore declared legal shall fall on Sunday, then the next following day shall be a legal holiday . . . .

Id.

[56] 250 So. 2d at 639.

[57] Marlboro Shirt Co. v. Whittington, 195 So. 2d 920 (Miss. 1967).

[58] Parkman v. Mississippi State Highway Comm'n, 250 So. 2d 637, 638 (Miss. 1971).

[59] Miss. R. Civ. P. 6(a) (May, 1978 draft) provides:

> Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or any other day when the courthouse or the clerk's office is in fact closed, whether with or without legal authority, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, a legal holiday, or any other day when the courthouse or the clerk's office is closed. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation . . . .

[60] For a discussion of the vital importance of the motion for a new trial in order to

requirement can mean that one has less than a day to file this important motion if the case is tried on the last day of the term.[61] Furthermore, this rule has been applied to a special court of eminent domain to reach the incredibly harsh result that one must file his motion for a new trial before the special court adjourns from that case.[62]

The fluctuations that now exist with regard to time for filing the motion for a new trial would be abrogated by adoption of the proposed rules, since rule 59(b) requires that such motion "be served not later than ten days after the entry of the judgment," and rule 6(c) provides that "[t]he period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court." The certainty needed in this area will be provided by these two rules.

C. *Service of Process*

Proposed rule 4(b) will make service of process by certified mail, return receipt requested, the preferred method of service. This innovation will save parties to litigation much needless expense and, in most situations, will expedite obtaining process on defendants. Additionally, rule 4(a)(2) will require that a copy of the complaint be attached to each summons, which will assure that the defendant is better informed of the substance of the lawsuit and will obviate the unnecessary requirement of leaving copies of the declaration with the clerk.[63]

D. *Default Judgments on Five Days Process*

Existing civil procedure in Mississippi permits a court to render a default judgment against a defendant who has been personally served[64] five days before the return day,[65] even though the case is not triable at that term unless the defendant has been personally served thirty days before the return date.[66] Inadequate notice is a problem even when dealing with resident defendants who have been personally served with process, but this brief period seems indefensible when applied to a nonresi-

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preserve error for consideration on appeal, see Allen & Taylor, *Appeals to the Mississippi Supreme Court,* 48 MISS. L.J. 505, 531 (1977).

[61] National Cas. Co. v. Calhoun, 67 So. 2d 908, 909 (Miss. 1953).

[62] Mississippi State Highway Comm'n v. First Methodist Church, 323 So. 2d 92, 95 (Miss. 1975).

[63] Miss. Cir. Ct. Rule 20. For a compilation of the rules of the courts of Mississippi, see THE MISSISSIPPI ATTORNEY'S DESK BOOK (1976).

[64] MISS. CODE ANN. § 11-7-121 (1972).

[65] *Id.* § 13-3-11.

[66] *Id.* § 11-7-121.

dent served with process under the Mississippi long-arm statutes.[67] The five day minimum is entirely too brief a period of notice upon which to base a default judgment. Many injustices have occurred because of this rule[68] and will continue to occur until a more reasonable time period is allowed. Rule 12(a) will help avoid such injustices by allowing a defendant thirty days to answer after service of the summons and complaint.

E. Summary Judgment

Proposed rule 56 would add summary judgments to state practice. This addition is sorely needed, for at the present time there is no method available to a plaintiff or defendant to dispose of a well-pleaded case in advance of trial. Under present practice, great injustice and expense, such as attorneys' fees, which usually cannot be recovered, are often suffered by a party in preparing for a trial at which there will be no genuine issue about any material fact. The motion for summary judgment will prevent such injustice since, unlike the demurrer or any other motion for judgment on the pleadings, this motion allows a party to go behind the pleadings through the use of discovery devices and affidavits to show that he is entitled to judgment as a matter of law.[69] There should be no prejudice to a party suffering summary judgment since the judgment will not be granted if there is the "slightest doubt" concerning the facts.[70]

F. Nonsuits

Under present Mississippi statutory[71] and case law,[72] a plaintiff is given the absolute right to take a voluntary nonsuit at any time before the jury retires, unless the judge is in the process of considering a defense motion for a directed verdict or peremptory instruction.[73] Although many attorneys contend that this "absolute right" is time-honored and sacred, the many abuses that have occurred through the years seem to make the practice indefensible. When one considers the time and expense that the defendant must waste in such abortive attempts to complete litigation, coupled with the fact that a defendant usually has no opportunity to recover for his lost time or attorneys' fees, one is faced with a situation that cries for amelioration. Rule 41 offers an excellent compromise between the rights of plaintiffs and defendants. Plaintiffs will retain the right to nonsuit, but this right will only extend to "any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs."[74] After that point in the proceeding, a plaintiff may request a nonsuit but must receive leave of court, and the nonsuit will be "upon such terms and conditions as the court deems proper."[75] The approach of rule 41 should curb the type of abuses that have occurred under existing practice while permitting nonsuits in situations where a plaintiff has a legitimate need supported by a valid reason for allowing nonsuit.

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[67] *Id.* §§ 13-3-57 to -63.

[68] *See, e.g.,* Ellis v. Milner, 194 So. 2d 232, 235 (Miss. 1967) (default judgment taken three weeks after process served).

[69] *Cf.* JAMES & HAZARD, CIVIL PROCEDURE 219 (2d ed. 1977) (analysis of why matters that cannot be proved are often pleaded).

[70] *Id.* at 150.

[71] MISS. CODE ANN. § 11-7-125 (1972).

[72] *E.g.,* Hattiesburg Butane Gas Co. v. Griffin, 206 So. 2d 845 (Miss. 1968).

[73] *Id.* at 847.

G. *Venue in Transitory Causes of Action Against Resident Defendants*

The recent Mississippi case of *Gillard v. Great Southern Mortgage & Loan Corp.*[76] has exacerbated the already confused area of venue for transitory causes of action against resident defendants. The basic problem in this area is determining the effect of process issued from a county where venue is improper, to be served upon a resident defendant in another county. The majority of states have held either directly or inferentially that such process is valid throughout the entire state.[77] After *Gillard,* however, a Mississippi plaintiff who has served process on a defendant for whom venue would be proper may proceed against the defendant(s) for whom venue is improper only if plaintiff made a "bona fide and reasonable effort . . . to file his suit in a county where a defendant or one of them may be found."[78]

The major problem with the foregoing approach is that it will leave a large number of judgments that appear to be final in a state of limbo concerning their validity since there might be a later attempt to show that a plaintiff did not make the requisite "bon a fide and reasonable effort." Proposed rule 82(d) is modeled after section 11-11-17 of the Mississippi Code[79] and is intended to adopt the suggestions of Justice Sugg and Justice Broom in their respective dissenting opinions in *Gillard.*[80] If interpreted as suggested in the Advisory Committee's comment, the proposed rule would allow plaintiffs to have statewide service of process in transitory causes of action while reserving to defendants the right to have venue transferred on timely motion to a county where venue is proper, with all costs incident to transfer being assessed to the plaintiffs. This approach has the dual virtues of ensuring the finality of a judgment while protecting a defendant's right to have his trial in a county where venue is proper without suffering expense in order to exercise this right.

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[74] Miss. R. Civ. P. 41(a)(1)(i) (May, 1978 draft).

[75] *Id.* 41(a)(2).

[76] 354 So. 2d 794 (Miss. 1978), *noted in* 49 MISS. L.J. (1978) (next issue).

[77] 43 MISS. L.J. 130, 137 (1972).

[78] 354 So. 2d at 798.

[79] MISS. CODE ANN. § 11-11-17 (1972).

[80] 354 So. 2d at 798.

IV. Conclusion

The examples set forth above in section III illustrate the types of improvement in the day-to-day practice of law that will be experienced by the adoption of the Proposed Mississippi Rules of Civil Procedure. The practice of law has many aspects that are analogous to walking through a minefield, and when we have an opportunity as a bench and bar to defuse a large number of the mines, we must act as expeditiously as possible.

The Board of Directors of the Young Lawyers Section, Mississippi State Bar, has resolved by an overwhelming vote, 24 to 4, to endorse the adoption of the proposed rules in their entirety. The argument for complete adoption of the rules has been artfully stated as follows:

> The Proposed Rules are a comprehensive, interdependent procedural framework for the conduct of civil litigation. They are not a disconnected list from which one may pick and choose on an *ad hoc* basis. In many instances, the Proposed Rules complement each other in such a way that rejection of one will create a ripple effect seriously disruptive of others. Moreover, one of the chief virtues of the Proposed Rules is that they collect in one comprehensible and convenient location rules of practice and procedure which have until now been scattered throughout the Mississippi Code and various local court rules.
>
> Accordingly, the committee believes the Proposed Rules are properly considered as a unit, and should be accepted on that basis. This is not to say that any change whatever to the Proposed Rules would destroy their effectiveness, or that no committee member can find fault with them in any respect. But it is to say that the committee believes the primary benefit of the Proposed Rules is to be found in the completeness and consistency of their application. Although some changes in the Proposed Rules can doubtless be made without doing violence to their essential effectiveness, to the extent that drastic changes are made, or Rules omitted altogether, much of their benefit will be lost . . . .
>
> In sum, the committee believes adoption of the Proposed Mississippi Rules of Civil Procedure, in their entirety, will constitute the most significant advance in Mississippi jurisprudence in this century . . . .[81]

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[81] Young Lawyers Section, Mississippi State Bar, Interim Report and Recommendation of the Committee on Mississippi Rules of Civil Procedure 6 (July 25, 1978). At a

The procedure for adopting the rules calls for the Advisory Committee to submit a final draft of the rules to the supreme court.[82] The supreme court must then forward the rules to the secretary of the senate and the clerk of the house of representatives at least 120 days before the beginning of a regular session of the legislature. If not defeated by the legislature, the rules will become effective on the first day of July following that regular session.[83]

On July 10, 1978, the Advisory Committee formally submitted the proposed rules to the Mississippi Supreme Court. The court has chosen, however, not to forward the rules to the legislature for consideration in the 1979 session in order to schedule a series of public hearings concerning the rules before the court sitting en banc.[84]

Every member of the bench and bar is urged to study the Proposed Mississippi Rules of Civil Procedure and then to work for their adoption. Members should attend the hearings before the supreme court and make suggestions for change if they are deemed necessary. Contacting other members of the bar and judiciary, as well as members of the legislature, will help to demonstrate strong support for adoption from within our profession. Adoption of the proposed rules offers what is probably the greatest opportunity for improvement to the practice of law that the State of Mississippi has ever had. As members of the legal profession, we owe a duty, not only to ourselves, but to all the citizens of our state, to see that this opportunity is not lost.

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meeting held in Jackson, Mississippi, on July 22, 1978, the 12 committee members in attendance unanimously recommended that the proposed rules be adopted in their entirety. One committee member unable to attend the meeting filed a letter statement indicating that he did not favor adoption of the proposed Rules in toto. Letter from James A. Peden, Jr., President, YLS, Mississippi State Bar to the Honorable Neville Patterson, Chief Justice, Supreme Court of Mississippi (August 10, 1978).

[82] MISS. CODE ANN. § 9-3-69 (Supp. 1977).

[83] *Id.* § 9-3-71.

[84] Telephone interview with Neville Patterson, Chief Justice, Mississippi Supreme Court (September 6, 1978).

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1977 MISSISSIPPI SUPREME COURT REVIEW

INTRODUCTION

At various times throughout the previous forty-eight volumes of the *Mississippi Law Journal,* there have been reviews of the Mississippi Supreme Court's work for particular terms. The most recent of these was in 1966. While it was to be the first of a series, it has, unfortunately, waited twelve years for a successor. With this issue we inaugurate a new attempt in this direction, a review that will be followed by many others.

The prior reviews have largely been authored by practitioners. We depart from that mold in this review. The idea was originally revived by a previous editor a year or so ago with the specific intention that the review act as a vehicle for publishing students' works. It has succeeded admirably in that regard, and, with this review, nine members of the *Journal* will see their efforts in print.

A further end moved us to produce this review. We feel that state law is one of the prime concerns of the *Journal,* as evidenced by the contents of forty-eight years' worth of issues. We wish to maintain that coverage. Similarly, Mississippi law is of the highest importance for all Mississippi lawyers and law students, and this review will offer a current forum for discussion and argument concerning the court's recent work in given areas. If we do not always agree with the court, I am sure the justices will grant that it is the give and take of contrasting views about today's law that will produce tomorrow's better law.

This being the first of a series, its format is not fixed. The rigors of the writing and editorial processes will undoubtedly point out changes required in future reviews. It may even be more useful to change the period of the review from the calendar year to the older concept of reviewing specific terms. Regardless, we feel, along with the authors of the 1966 review, that "this is the beginning of a project we think will grow and produce one of the most useful publications for the Mississippi bench and bar."

In closing it is only proper to dedicate this work to Presiding Justice of the Mississippi Supreme Court William H. Inzer, who died on March 1, 1978. His decisions play significantly in this review and, as if further justification were needed, he was a distinguished alumnus of the *Mississippi Law Journal.*

H. M. Yoste, Jr.
Editor-in-Chief

BOARDS AND COMMISSIONS

Focusing primarily upon the various boards and commissions regulating claims arising from an employment context,[1] the Mississippi Supreme Court made several significant pronouncements in 1977 affecting the rights of employees and employers. The court exhibited flexibility in the allowance of work related claims and provided a practical measure of certainty to the adjudication of workmen's compensation and employment security claims.

I. Workmen's Compensation

During 1977, the Mississippi Supreme Court rendered eleven decisions construing the Mississippi workmen's compensation laws. Included in this discussion are three opinions: two dealing with statutes of limitations and one construing the term "grandchild."[2]

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[1] Other relevant decisions of the 1977 Mississippi Supreme Court concerning the various boards and commissions include: (1) the Board of Supervisors: Medina v. State, 354 So.2d 779, 783-84 (Miss. 1977) (loss of public character of county road occurs through ten year abandonment by nonuse as well as board of supervisor order); Board of Supervisors v. Standard Oil Co., 353 So.2d 1137, 1140 (Miss. 1977) (uniformity and equality of similarity of assessments of different properties is question for jury); Blakeney v. Sims, 349 So.2d 538, 539 (Miss. 1977) (construing Miss. Code Ann. § 35-3-21 (1972) to authorize paying salaries and providing space for veteran affairs coordinators); Merritt v. Tri-State Mill Supply Co., 342 So.2d 1302, 1303 (Miss. 1977) (failure of board to divide county into two judicial districts voided tax deed as tax sale based on invalid assessments); Howard v. Crider, 341 So.2d 477, 478-79 (Miss. 1977) (statutory thirty days' notice of election by board of supervisors applicable to local option elections on wine and beer sales); (2) School Boards: Strong v. Pearl Mun. Separate School Dist., 350 So.2d 1388, 1390 (Miss. 1977) (altering of county district boundaries required mandatory notice under Miss. Code Ann. § 37-7-105 (1972)); Jackson v. Board of Educ., 349 So.2d 550, 553 (Miss. 1977) (automatic renewal of teacher's employment at contract rate results from failure to comply with statutory notice intended by Public School Fair Dismissal Act); Adams County v. McCoy, 347 So.2d 366, 368 (Miss. 1977) (alleged sale by deed of sixteenth section lands by board invalid as board power is limited to leasing of such land); Dampier v. Lawrence County School Dist., 344 So.2d 130, 132 (Miss. 1977) (teacher not deprived due process nor impartial reemployment hearing absent showing of actual bias overcoming presumption of honesty of school board).

The following are synopses of opinions concerning various boards and commissions: Key Petroleum, Inc. v. Housing Auth., 357 So.2d 920, 922 (Miss. 1977) (properly issued building permit improperly revoked); Thompson v. Jones County Community Hosp., 352 So.2d 795, 797-98 (Miss. 1977) (action for breach of contract against hospital board of trustees not maintainable if parties' rights and liabilities could not be determined solely from contract terms); City of Jackson v. Mississippi State Bldg. Comm'n, 350 So.2d 63, 66 (Miss. 1977) (statutory building permits and fees inapplicable to state buildings constructed by State Building Commissions); Biglane Operating Co. v. Brown, 347 So.2d 1310, 1312 (Miss. 1977) (conflicting evidence does not overrule Board orders challenged against the weight of evidence); Mississippi Marine Conserv. Comm'n v. Misko, 347 So.2d 355, 357 (Miss. 1977) (governor appointed officer of Mississippi Marine Conservation Commission, not confirmed by senate, was de facto officer).

A. *One Year Statute of Limitations*

Section 71-3-53 of the Mississippi Code[3] provides for a one-year period, beginning upon payment of the last compensation, during which a workmen's compensation claimant can reopen the case by filing for additional benefits.[4] The Mississippi court has previously determined[5] that section 71-3-53 is to be read in conjunction with section 71-3-37(7),[6]

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[2] Not included in the textual discussion are the following cases dealing with other aspects of the Mississippi Workmen's Compensation Act: Miller Transporters, Inc. v. Seay's Dependant's, 350 So.2d 689, 691 (Miss. 1977) (reaffirmed the general rule that an injury which occurs while the employee is going to or returning from work is not incident to employment and thus not compensable); Donald v. Whatley, 346 So.2d 898, 900 (Miss. 1977) (compensation policy issued to the employer personally "had the effect of covering all of his employees in any activity which was within the purview of the statute," and included injury occurring during the nonprofit construction of the employer's own residence); Medard Div. of Jackes-Evans Mfg. Co. v. Adams, 344 So.2d 141, 144 (Miss. 1977) (complications resulting from the progression of a compensable injury were compensable absent the employer's establishing an independent intervening nonindustrial cause); Walton v. McLendon, 342 So.2d 732, 734 (Miss. 1977) (a widow living apart from her husband at his death, for justifiable cause or by his desertion, is entitled to compensation if, within three years of their separation, an award for separate maintenance or alimony has been made or a suit filed for separate maintenance or alimony).

Several decisions dealing with the Mississippi Workmen's Compensation Act turned on the application of the substantive evidence rule. *See* Dempsey v. State Poultry Co., 351 So.2d 329, 331 (Miss. 1977) ("the substantive evidence rule . . . does not mean a small part of the total evidence nor does the rule prevent the appellate court from examining the whole evidence"); Dixie Contractors, Inc. v. Ashmore, 349 So.2d 532, 533-34 (Miss. 1977) (even though the doctor's testimony was that the injury "could have" led to hemorrhage, the totality of the expert testimony in conjunction with corroborating evidence was substantial evidence in support of the Commission's order); Holloway v. Prassell Enterprises, Inc., 348 So.2d 771, 773 (Miss. 1977) (Commission order supported by substantial evidence will not be reversed); Gray v. Poloron Prod., 347 So.2d 363, 365 (Miss. 1977) (in reviewing the record the court must look at all the evidence on both sides).

[3] MISS. CODE ANN. § 71-3-53 (1972).

[4] *Id.* provides:

> Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a determination of fact, the commission may, at any time prior to one (1) year after date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one (1) year after the rejection of a claim, review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation or award compensation.

[5] H.C. Moody & Sons v. Dedeaux, 223 Miss. 832, 79 So.2d 225 (1956).

[6] MISS. CODE ANN. § 71-3-37(7) (1972) provides:

> Within thirty (30) days after the final payment of compensation has been made, the employer shall send to the commission a notice in accordance with a

which provides for notice to the claimant that a payment is final and the case is closed.[7] Under its rule-making authority granted by section 71-3-85,[8] the Workmen's Compensation Commission adopted rule B-17 requiring that this notice be given by sending Form B-31, Final Report and Settlement Receipt, to the claimant for his signature, or by giving the claimant notice that the form has been filed with the Commission.[9] Accordingly, the one year period begins to run from the date claimant has actual notice that the proper report has been filed with the Commission.[10]

In Mississippi, a Form B-31, Final Report and Settlement Receipt, signed by the claimant, constitutes sufficient notice that payment is final and that the claimant is entitled to a hearing on additional compensation.[11] The hearing must, of course, be conducted within the statutory period.[12] In one case involving the notice provisions,[13] the employer notified the claimant by letter, not that the payment was final, but that payments were being suspended. A Form B-31 was later filed. Holding

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> form prescribed by the commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid . . . . [N]o case shall be closed . . . without notice to all parties interested and without giving to all such parties an opportunity to be heard.

[7] H.C. Moody & Sons v. Dedeaux, 223 Miss. 832, 843-44, 79 So.2d 225, 229 (1955); *see, e.g.*, McLemore v. Jackson Tile Mfg. Co., 252 So.2d 781, 782 (Miss. 1971) (compensation act requires notice to claimant); International Paper Co. v. Evans, 244 Miss. 49, 56, 140 So.2d 271, 274 (1962) (statute of limitations will not begin to run until claimant properly notified of actual filing); Hale v. General Box Mfg. Co., 228 Miss. 394, 401, 87 So.2d 679, 680 (1956) (same).

[8] MISS. CODE ANN. § 71-3-85 (1972). *Id.* § 71-3-85(3) grants the Commission "the power to adopt rules and regulations and make or approve the forms relating to notices of injuries, payment of claims, and other purposes." *Id.* § 71-3-85(5) mandates that the commission "adopt detailed rules and regulations implementing the purposes of this chapter," while *id.* § 71-3-85(6) states that the "Commission shall adopt or approve the forms required for administering the chapter . . . and may require the exclusive use of any or all such approved forms."

[9] Miss. Workmen's Compensation Comm'n R. B-17 (1968) states:

> The requirement for the filing of Commission Form B-31, Final Report and Settlement Receipt, shall be deemed to have been met upon receipt by the Commission of such form, signed by the claimant, provided, however, that the form so filed is in accordance with the requirements of Section 13(g) of the Act [MISS. CODE ANN. § 71-3-37(7) (1972)] and contains the information specified therein. In the event Form B-31 is not signed by claimant, the unsigned form shall be filed with the Commission with notice of such filing given to the claimant.

[10] McLemore v. Jackson Tile Mfg. Co., 252 So.2d 781, 783 (Miss. 1971).

[11] H.C. Moody & Sons v. Dedeaux, 223 Miss. 832, 844, 79 So.2d 225, 229 (1955).

[12] *Id.* at 843-44, 79 So.2d at 229.

[13] Hale v. General Box Mfg. Co., 228 Miss. 394, 87 So.2d 679 (1956).

that compliance with the notice provisions is mandatory, the Mississippi court reasoned that a claim is not barred when filed within one year after a B-31 is filed, even though more than one year has passed since the date of the last payment.[14]

In another situation,[15] the employer filed a Form B-31, which the claimant refused to sign, but the employer failed to give the claimant notice of the filing.[16] After notice was given to the claimant by the Commission, the claimant filed for additional benefits. The supreme court held that the claim, filed more than a year after the filing of the Form B-31, was not barred since it was filed less than a year after notice of the filing was given.[17]

The supreme court has also considered the adequacy of the notice that a B-31 has been filed. In one decision,[18] the claimant challenged the validity of a Form B-31 because it did not state that final payment had been made. The court held that the claimant, who received the form but refused to sign it, had sufficient notice since he knew that his signature would close the case.[19] The Mississippi judiciary has also recognized the legislative attempt to afford due process through the notice requirement by providing that cases would not be closed until the claimant had received notice of closing, thus giving him an opportunity to be heard after notice has been given to the Commission.[20]

Last year, in *Brown v. F.W. Woolworth Co.*,[21] an employer who had paid the claimant in 1968 filed a Form B-31 with the Commission in April, 1969. The form used was prepared by the insurance company, and was not the form supplied by the Commission. Three years later, the claimant filed an additional claim for medical benefits. As a defense, the employer asserted that the claim was barred by the one year statute of limitations. The circuit court affirmed the Commission's denial of compensation, holding that the claimant's right to compensation benefits was barred by the statute of limitations.[22] On appeal, the supreme court announced that the claimant had been denied due process of law since the Form B-31 failed to give adequate notice of finality.[23] The *Brown* court recognized that when the Form B-31 lacked the required term "final," the claimant was not provided final notice of filing and of closing the case, and was not given an opportunity to be heard.[24] Thus, the claim was not barred by the statute of limitations.[25]

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[14] *Id.* at 401-02, 87 So.2d at 680.

[15] International Paper Co. v. Evans, 244 Miss. 49, 140 So.2d 271 (1962).

[16] *Id.* at 53, 140 So.2d at 273.

[17] *Id.* at 56-57, 140 So.2d at 274-75; *accord,* Empire Home Builders v. Guthrie, 187 So.2d 17, 18 (Miss. 1966) (statute of limitations did not run where no notice was filed with Commission); Nichols v. American Creosoting Co., 245 Miss. 414, 417, 146 So.2d 76, 77 (1962) (filing with Commission but failing to notify claimant was no bar to claim two years later); *cf.* H.C. Moody & Sons v. Dedeaux, 223 Miss. 832, 843, 79 So.2d 225, 229 (1955) (where claimant is a minor, one-year period begins to run when claimant becomes twenty-one). *See generally* V. DUNN, MISSISSIPPI WORKMEN'S COMPENSATION §§ 255, 256, 336 (2d ed. 1967 & Supp. 1977).

[18] Carter v. Wrecking Corp. of America, 234 Miss. 559, 107 So.2d 116 (1958).

[19] *Id.* at 566-67, 107 So.2d at 120.

[20] McLemore v. Jackson Tile Mfg. Co., 252 So.2d 781, 784 (Miss. 1971). *See generally* V. DUNN, *supra* note 17, § 256 (Supp. 1977). "Without such notice to the claimant, he is not chargeable with knowledge that affirmative action upon his part is necessary to controvert the position of the employer, and until he has such notice, the one year statute does not begin to run." *Id.*

[21] 348 So.2d 236 (Miss. 1977).

If the purpose of the Form B-31 filing is to give the claimant notice that the case is being closed, the notice in *Brown* appears sufficient. As noted by the dissent, one copy of a complete Form B-31 had been sent to the claimant by registered mail and another to the Commission, and the claimant had the Form B-31 with her at the hearing; thus, there was adequate "final" notice.[26]

The supreme court has indicated that it will give a broad and liberal construction to the workmen's compensation laws,[27] resolving doubtful cases in favor of compensation[28] without overemphasizing technicalities or valuing form over substance.[29] In Mississippi, "the construction must be sensible as well as liberal"[30] and "in line with reason."[31] Yet, "[e]ven a liberal construction of the statute cannot amend it by judicial legislation"[32] or "excuse non-compliance with prerequisite conditions imposed by the legislature."[33]

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[22] *Id.* at 237.

[23] *Id.* at 237-41. For notice to be adequate, it must inform the claimant that the report and receipt filed with the commission are final, that the case is being closed, and that the claimant has the opportunity to be heard. *Id.*

[24] *Id.* at 239.

[25] *Id.*

[26] *Id.* at 242.

[27] Dixie Contractors, Inc. v. Ashmore, 349 So.2d 532, 535 (Miss. 1977); Gray v. Poloron Prod., 347 So.2d 363, 365 (Miss. 1977).

[28] Gray v. Poloron Prod., 347 So.2d 363, 375 (Miss. 1977); Speed Mechanical, Inc. v. Taylor, 342 So.2d 317, 319 (Miss. 1977).

[29] Lindsey v. Ingalls Shipbuilding Corp., 219 Miss. 437, 447, 68 So.2d 872, 877 (1954) (citing Williams Mfg. Co. v. Walker, 206 Ark. 392, 175 S.W. 2d 380, 383 (1943)); *accord,* Dixie Contractors, Inc. v. Ashmore, 349 So.2d 532, 533-35 (Miss. 1977) (doctor's use of "could have" to describe causal connection not applied as technicality to defeat award of compensation).

> The compensation process is not a game of "say the magic word," in which the rights of injured workers should stand or fall on whether a witness happens to choose a form of words prescribed by a court or legislature. What counts is the real substance of what the witness intended to convey . . . .

3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 80.32 (1976), *quoted in* Dixie Contractors, Inc. v. Ashmore, 349 So.2d 532, 533 (Miss. 1977).

[30] Deemer Lumber Co. v. Hamilton, 211 Miss. 673, 683, 52 So.2d 634, 638 (1951) (citing Lucedale Veneer Co. v. Rogers, 211 Miss. 613, 622, 48 So.2d 148, 150 (1950)); V. DUNN, *supra* note 17, § 32.

[31] Sanders v. B.E. Walker Constr. Co., 251 Miss. 352, 362, 169 So.2d 803, 807 (1964).

The *Brown* court did give a broad and liberal construction to find compensation, but only by placing unwarranted significance on the word "final." In so doing, the court in *Brown* excused the claimant's failure to comply with the prerequisites for workmen's compensation. Apparently, the emphasis on technicality and form over substance operates only against the employer and carrier. The "broad and liberal construction" rule will be applied to excuse a claimant from compliance with statutory requirements.

B. *Two Year Statute of Limitations*

In Mississippi, statutory law provides that if no compensation other than medical benefits is paid, a claimant's right to request compensation is barred if an application for benefits is not filed within two years of the injury.[34] Thus, compensation for medical treatment alone is insufficient to toll the two year statute of limitations.

Medical benefits are not expressly included within the statutory definition of "compensation,"[35] yet the courts have construed other sections of the code to recognize medical payments as compensation for purposes of tolling the one year statute of limitations.[36] Although there appears to be no express limitation on claims for medical benefits, the court, in one decision,[37] stated that section 71-3-35(1) of the Mississippi Code places a two year limitation on all claims.[38] Thus, the supreme court has determined that the legislature's intent was "to put the same period of limitation on the payment of medical benefits as it has put on the payment of compensation."[39]

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[32] Ingalls Shipbldg. Corp. v. Byrd, 215 Miss. 234, 249, 60 So.2d 645, 651 (1952).

[33] Speed Mechanical, Inc. v. Taylor, 342 So.2d 317, 319 (Miss. 1977).

[34] Miss. Code Ann. § 71-3-35(1) (1972).

[35] *Id.* § 71-3-3(j) defines compensation as "the money allowance payable to an injured worker or his dependents as provided for in this chapter, and includes benefits included therein."

[36] "Compensation" in *id.* § 71-3-37 (7) (notice following final compensation payment) and § 71-3-53 (reopening cases within one year after final compensation payment notice) includes medical payments. *See* Shainberg's Black & White Store v. Prothro, 238 Miss. 444, 448, 118 So.2d 862, 864 (1960) (medical service is compensation for purpose of voluntary reopening of case); Gibbs v. Bass, 237 Miss. 823, 827-28, 116 So.2d 542, 544-45 (1959) (furnishing medical benefits tolls one year statute); Graeber Bros. v. Taylor, 237 Miss. 691, 697, 702, 115 So.2d 735, 737, 740 (1959) (payment of medical expenses equivalent to compensation payment). *See generally* V. Dunn, *supra* note 17, § 252; 3 A. Larson, *supra* note 29, § 78.43(b). *But cf.* Turnage v. Lally's Swimming Pool, 247 Miss. 713, 717, 159 So.2d 84, 85 (1963) (claim not revived by authorized medical treatment after running of statute of limitations). Not all jurisdictions agree with this interpretation. *See* Welborn v. Southern Equip. Co., 395 S.W. 2d 119, 124 (Mo. 1965) (claim revived by supplying medical aid after statute of limitations had run and before claim had been filed).

[37] Trehern v. Grafe Auto Co., 232 Miss. 854, 100 So.2d 786 (1958).

[38] *Id.* at 857, 100 So.2d at 787.

During 1977, the Mississippi Supreme Court, in *Speed Mechanical, Inc. v. Taylor,*[40] entertained an appeal by a claimant who was injured in May, 1971, but who lost no wages and filed no claim for lost wages. Medical payments, however, were made until April, 1973. The administrative law judge ruled that the claim filed in November, 1973, for additional medical benefits was barred by the two year statute of limitations. Contending that the two year statute barred him only from lost time subsidy, the claimant appealed to the full commission. Additional benefits were allowed by the Commission and, on appeal, the circuit court affirmed the commission's decision.

On appeal, the Mississippi Supreme Court reversed the circuit court, stating that since there had been no compensation, other than for medical treatment, and no application for benefits filed within two years of the date of injury, the claimant was forever barred from all benefits.[41] This bar included compensation for lost time and medical and funeral expenses, regardless of when the medical expense payments were made.[42]

Speed Mechanical determined that voluntary medical payments made within the two year period, absent any other action required by section 71-3-35(1), do not toll the statute to allow a claim for medical benefits after the two year period.[43] To hold otherwise, the court felt, would unjustly impose on the employer or carrier liability for medical expenses that was not intended by the Mississippi Workmen's Compensation Act.[44] By so holding, the court has placed a heavy burden on employees. If all medical bills are being paid, an employee may not realize the need to file a claim until the statute of limitations has run.[45] An alternative, and possibly more just, approach would be to require an employer to file a Form B-31[46] indicating that medical payments are final. The employee would then have one year to file a claim.

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[39] *Id.*

[40] 342 So.2d 317 (Miss. 1977).

[41] The court found an exception, however, in cases of "latent" injury which is not "reasonably apparent." *Id.* at 320 (citing Struthers Wells-Gulfport, Inc. v. Bradford, 304 So.2d 645 (Miss. 1974)).

[42] 342 So.2d at 319.

[43] The language of MISS. CODE ANN. § 71-3-35(1) (1972) seems to require both payment of compensation, other than medical or funeral expenses, and filing of an application for benefits in order to erase the two year statute. However, *Speed Mechanical,* 342 So.2d at 319, implies that payment of compensation alone would be sufficient. *See* V. DUNN, *supra* note 17, § 259 (payment of compensation alone sufficient to toll statute); *accord,* Martin v. L. & A. Contracting Co., 249 Miss. 441, 448, 162 So.2d 870, 872-73 (1964) (compensation paid voluntarily under act of another state waived the statute of limitations where payments were made because employer recognized his liability for compensation); 3 A. LARSON, *supra* note 29, § 78.43(c). Left open is the issue of whether filing of an application without payment of compensation would satisfy the requirements of § 71-3-35(1).

[44] *See* 342 So. 2d at 319.

C. *Grandchild Treated as a "Child" Under the In Loco Parentis Doctrine*

For a qualified, dependent grandchild,[47] section 71-3-25(e) of the Mississippi Code provides death benefits in an amount equal to fifteen percent of the wages of the deceased.[48] Under section 71-3-25(d), however, when the deceased, leaving no spouse, is survived by a child, death benefits of twenty-five percent of the deceased's wages accrue to the child.[49] Section 71-3-3(l) defines "child" as one "in relation to whom the deceased employee stood in the place of a parent for at least one (1) year prior to the time of injury."[50] The statutory phrase "person in the place of a parent"[51] is identical in meaning to the phrase "in loco parentis."[52] By assuming the position of parent, one becomes obligated to support, educate, and supervise the child of another as if the child were his own.[53] The existence of the in loco parentis relationship depends upon the intent of the parental figure and the facts of the particular case.[54]

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[45] *See id.* (medical payments were made until less than one month before the two years expired).

[46] See notes 4 through 33 and accompanying text *supra*.

[47] Miss. Code Ann. § 71-3-3(2) (1972) provides:

> "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood in the place of a parent for at least one (1) year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined.

[48] *Id.* § 71-3-25(e). *See generally* V. Dunn, *supra* note 17, §§ 218, 220, 222.

[49] Miss. Code Ann. § 71-3-25(d) (1972). *See generally* V. Dunn, *supra* note 17, § 209.

[50] Miss. Code Ann. § 71-3-3(1) (1972). The definition of "child" includes a broader classification. *Id.* Stanley v. McLendon, 220 Miss. 192, 198, 70 So.2d 323, 326 (1954); V. Dunn, *supra* note 17, §§ 210, 214-17. For a consideration of rights of the unacknowledged, dependent illegitimate child, see *id.* § 217.

[51] Miss. Code Ann. § 71-3-3(1) (1972).

[52] W.R. Fairchild Constr. Co. v. Owens, 224 So.2d 571, 575 (Miss. 1969); Farve v. Medders, 241 Miss. 75, 81, 128 So.2d 877, 879 (1961).

[53] 224 So.2d at 575; V. Dunn, *supra* note 17, § 216; *accord,* Ingalls Shipbldg. Corp. v. Newman, 322 F. Supp. 1229, 1247 (S.D. Miss. 1970), *aff'd,* 448 F.2d 773 (5th Cir. 1971).

[54] 241 Miss. at 81, 128 So.2d at 879. The facts involved necessarily include a finding of the existence of the relationship for at least one year, Miss. Code Ann. § 71-3-3(1) (1972), and of actual dependency, *id.* §§ 71-3-3(r), -25(g). *See* Boen's Dependents v. Foster, 241 Miss. 520, 524-25, 130 So.2d 877, 879 (1961) (dependency on employee for one year sufficient for eligibility even if claimant has living parents); Stanley v. McLendon,

The Mississippi judiciary first confronted the in loco parentis doctrine in a workmen's compensation context in 1954.[55] In that case, the claimants were dependent, minor illegitimate children of the illegitimate child of the deceased employee's wife.[56] The Mississippi court stated:

> One of the primary purposes of the Workmen's Compensation Act is to relieve society of the burden of supporting in orphanages or public almshouses helpless children, who have been left without means of support because of the death of the wage earners who have lost their lives in industrial accidents; and the benefits of the act are not limited to children begotten in lawful wedlock.[57]

Upon finding the requisites for an in loco parentis relationship, the court has, in the past, held children to be entitled to death benefits.[58] This statutorily created benefit has been allowed even when the claimants were children of the deceased's mistress.[59] Although the children's

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220 Miss. 192, 199-200, 70 So.2d 323, 326 (1954) (benefits allowable where claimant was dependent on non-blood relation for one year); V. DUNN, *supra* note 17, § 216 (of primary importance is the deceased having treated the child as his own and actually supporting it, not the identity of the natural parent). For a discussion as to what constitutes dependency under the Mississippi Workmen's Compensation Act and when entitlement to benefits accrues, *see generally id.*, §§ 225-228.

Generally, a legitimate unmarried child under eighteen is entitled to a conclusive presumption of dependency, with no requirement of actual dependency. MISS. CODE ANN. §§ 71-3-3(r), -25(g) (1972); Watson v. National Burial Ass'n, 234 Miss. 749, 754-56, 107 So.2d 739, 742 (1958); Anderson-Tully Co. v. Wilson, 221 Miss. 656, 664-65, 74 So.2d 735, 738 (1954); V. DUNN, *supra* note 17, § 213. Other classes of "children," as defined in MISS. CODE ANN. § 71-3-3(1) (1972), are not entitled to any such presumption, and facts of dependency must be established. *See* Fernwood Indus. v. Mitchell, 219 Miss. 331, 335-36, 68 So.2d 830, 832 (1953) (illegitimate child); Stanford v. Stanford, 219 Miss. 236, 244-45, 68 So.2d 275, 278 (1953) (same). *See generally* V. DUNN, *supra* note 17, §§ 213-217, 225-228 (discussion of factors in determining dependency and of various possible dependency relationships). *But see* Jimenez v. Weinberger, 417 U.S. 628, 635, 637 (1974) (denial of presumption of dependency to certain illegitimates born after disability of Social Security recipient is unconstitutional); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173-74, 176 (1972) (exclusion of unacknowledged illegitimates from Workmen's Compensation benefits unconstitutional under the equal protection clause of the fourteenth amendment).

[55] Stanley v. McLendon, 220 Miss. 192, 70 So.2d 323 (1954).

[56] *Id.* at 195-96, 70 So.2d at 324-25.

[57] *Id.* at 199, 70 So.2d at 326; *see* V. DUNN, *supra* note 17, § 2 (one of the primary purposes of MWCA is to create mechanism to support children of deceased industrial workers regardless of their legitimacy); *cf.* Franklin v. Jackson, 231 Miss. 497, 503, 95 So.2d 794, 796 (1957) (benefits to person over eighteen capable of self support inconsistent with purpose of act).

[58] 220 Miss. at 200, 70 So.2d at 326; *accord,* Franklin v. Jackson, 231 Miss. 497, 500-01, 95 So.2d 794, 795 (1957) (dependent minor niece and nephew awarded benefits under in loco parentis doctrine).

[59] Boen's Dependents v. Foster, 241 Miss. 520, 524-25, 130 So.2d 877, 879 (1961).

parents were living and therefore legally obligated to support the children, the court held that such a situation was insufficient to override the in loco parentis doctrine. Consequently, benefits were awarded to the children.[60]

The status of a dependent, orphaned grandchild under the workmen's compensation scheme was confronted by an Alabama court in 1925.[61] That court's construction of the relevant statutes revealed that grandchildren as a class were excluded as beneficiaries, since "the grandchild is supposed to have those of nearer blood due to support him."[62] Noting that an orphaned grandchild is eligible to inherit under the descent and distribution laws, the Alabama court implied an in loco parentis relationship and permitted the claim.[63] Aware of the anomaly of compensating stepchildren while turning the orphaned grandchild away, the court stated, "The humanities of the case, the causes giving birth to compensation laws, forbid such construction [to deny the orphaned grandchild]."[64]

The Mississippi Supreme Court, in *Longleaf Forest Products, Inc. v. Hopkins,*[65] faced a situation in 1977 where two minor dependents, having lived with their grandfather for more than one year prior to his death, sought death benefits under the workmen's compensation laws. Although the commission's order awarding benefits to the dependents as "children" was affirmed by the circuit court,[66] the employer contended that the dependents were natural grandchildren and should receive fewer benefits under the statutory provision for grandchildren. The supreme court, however, affirmed the award, viewing the grandchildren as "children," since the deceased employee stood in loco parentis for at least one year before the date of injury.[67]

The claimants in *Longleaf Forest Products* were eligible for awards as dependent grandchildren,[68] but their relationship to the deceased exceeded mere dependency.[69] As grandchildren in their particular circumstances and as parties to an in loco parentis relationship,[70] their situation after the death of the employee was no different from the situation of claimants in prior Mississippi decisions.[71] There is no reason that a blood relationship similar to a nonblood relationship should be penalized by a name or designation when their actual situations are the same. Compensation should not be based on a claimant's titular designation, but on his actual relationship with the deceased. For statutory purposes, the grandchildren in *Longleaf Forest Products* were "children." Each grandchild was therefore entitled to a child's share of the death benefits.[72] The purposes of the Mississippi workmen's compensation laws, particularly to aid helpless children "left without means of support,"[73] can only be furthered by the holding in *Longleaf Forest Products.*[74]

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[60] *Id.* at 524-25, 130 So.2d at 879; *cf.* Austin v. Austin, 147 Neb. 109, 22 N.W.2d 560, 563 (1946) (in will contest, in loco parentis doctrine was applicable to grandparent-grandchild relationship, even though grandchild's father was living).

[61] *Ex parte* Cline, 213 Ala. 599, 105 So. 686 (1925).

[62] 105 So. at 686.

[63] *Id.* at 688-89.

[64] *Id.* at 689. *But cf.* Darce v. Calcasieu Paper Co., 85 So.2d 659, 662 (La. Ct. of App. 1956) (where definition of child in workmen's compensation statute included neither a grandchild nor the in loco parentis situation, wholly dependent grandchildren were awarded fewer benefits under "other dependents" definition).

[65] 349 So.2d 523 (Miss. 1977).

[66] *Id.* at 524.

[67] *Id.* at 525.

[68] *Id.* at 524. For the statutory requirements as to a dependent grandchild's entitlement to benefits, see MISS. CODE ANN. § 71-3-25(e) (Supp. 1977).

II. EMPLOYMENT SECURITY COMMISSION

Treatment of pregnancy as a cause of unemployment for purposes of compensation has, in the past decade, taken various courses. Eleven years ago, a Louisiana court[75] confronted a statute which disqualified a claimant who "left his employment without good cause connected with his employment."[76] In that case, the claimant's mandatory maternity leave of absence had been provided for in a collective bargaining agreement, but upon her return, no work was available.[77] The court, ruling that the claimant was ineligible for benefits since the underlying cause of unemployment was pregnancy, admitted that while "[p]regnancy is a good cause . . . [it is] not good cause connected with employment."[78]

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[69] 349 So.2d at 524-25.

[70] The court found both claimants to be "children" within the meaning of MISS. CODE ANN. § 71-3-3(1) (1972).

[71] See notes 55 through 60 and accompanying text *supra.*

[72] 349 So.2d at 525. *Compare* MISS. CODE ANN. § 71-3-25(d) (Supp. 1977) (children entitled to 25% of decedent's wages) *with id.* § 71-3-25(e) (grandchildren entitled to 15% of decedent's wages).

[73] See note 57 and accompanying text *supra.*

[74] The court noted that *Longleaf Forests Products* did not eliminate the statutory classification of grandchildren, but only made it possible for qualified grandchildren to be included in the definition of "children." 349 So.2d at 525. *See also* W.R. Fairchild Constr. Co. v. Owen, 224 So.2d 571, 576 (Miss. 1969) (conclusive presumption of dependency of child on natural parent should not be altered by fact that child has been adopted) (Rogers, J., dissenting).

[75] Southern Bell Tel. & Tel. Co. v. Administrator, Div. of Employment Security of Dept. of Labor, 197 So.2d 169 (La. Ct. of App. 1967).

[76] LA. REV. STAT. ANN. § 23:1601(1) (1964).

[77] 197 So.2d at 170.

[78] *Id.* at 171.

The following year, the Louisiana court, confronting a similar factual situation,[79] noted the claimant's legal right under the collective bargaining agreement to return to her old work, if available, and held that she had left her work for good cause.[80] The court reasoned that the cause was not her "prior condition of pregnancy," but "the then existing unavailability of work on the part of the employer."[81] Thus, she was entitled to benefits.[82]

Other jurisdictions have ruled in favor of eligibility for benefits by carefully analyzing the situation from which the claim arises. In a Massachusetts decision[83] construing a statutory provision similar to that of Louisiana,[84] the court based its allowance of benefits upon the terms of the collective bargaining agreement. As construed by the court, the agreement revealed that the parties contemplated a continuing employer-employee relationship.[85] Benefits have, however, been allowed even where a company's policy required termination of employment in the fifth month of pregnancy.[86] The courts have refused to deny benefits because of an arbitrarily drawn termination date since the severance of the employer-employee relationship was not voluntary.[87]

Mississippi's position concerning maternity leaves is best understood by a comparative analysis with the practices of other jurisdictions.

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[79] Southern Bell Tel. & Tel. Co. v. Administrator, Div. of Employment Security of Dept. of Labor, 211 So.2d 634 (La. 1968).

[80] *Id.* at 636.

[81] *Id.* The court found *Southern Bell I* not controlling since it was distinguishable on the basis of its improper reliance on the dissimilar factual situation of Algiers Homestead Ass'n v. Brown, 167 So.2d 349, 352 (La. 1964) (claimant was held to have resigned because requested leave of absence was never granted) and Olin Mathieson Chem. Corp. v. Brown, 188 So.2d 157, 158 (La. Ct. of App. 1966) (maternity leave was granted pursuant to labor agreement, but claimant made application for benefits at beginning of leave).

[82] 211 So.2d at 636.

[83] Western Elec. Co. v. Director of Div. of Employment Security, 163 N.E.2d 154 (Mass. 1960).

[84] MASS. GEN. LAWS ANN. ch. 151A, § 25(e) (West Supp. 1977) provides for disqualification if claimant "left his work . . . voluntarily without good cause attributable to the employing unit." See note 76 and accompanying text *supra*.

[85] 163 N.E.2d at 156. The agreement provided for leave with expectations of return but no guaranty of works, required request for reinstatement or notice of not desiring to return, and preservation of seniority status. *Id.*

[86] Gulf States Util. Co. v. Brown, 165 So.2d 580, 581 (La. Ct. of App. 1964).

[87] *Id.* at 581; *accord,* Harwood v. Employment Sec. Comm'n, 490 P.2d 1192, 1195 (Ariz. 1971) (fixed and unvarying company policy is not voluntary on part of employee). The Mississippi Supreme Court had the opportunity to consider company policy as an arbitrary rule in Mississippi Employment Sec. Comm'n v. Corley, 246 Miss. 43, 46, 148 So.2d 715, 716 (1963), but, failing to address that issue, cited Luke v. Mississippi Employment Sec. Comm'n, 239 Miss. 292, 123 So.2d 231 (1960) and denied benefits on the ground that pregnancy was voluntary. See note 93 and accompanying text *infra*.

In an Ohio decision,[88] maternity leave was granted pursuant to a union agreement, but during her absence the claimant was fired.[89] Denying benefits, the Ohio court applied the statutory provision, disqualifying an individual who "quit work . . . because of marital, parental, filial, or other domestic obligations or became unemployed because of pregnancy."[90] The court held that once the claimant was disqualified for benefits, her eligibility could not be reestablished by a subsequent cause that would not have originally disqualified her.[91] Rejecting the contention that the claimant had not quit work since the employment relation had not been severed, the Ohio court stated, "[T]he pregnancy of a married woman is clearly a condition arising out of marital, parental, filial or other domestic obligations."[92]

The Mississippi Supreme Court utilized the same language in a 1960 decision[93] interpreting a Mississippi statutory provision disqualifying a claimant who voluntarily leaves work.[94] In that case the Mississippi court denied benefits to a claimant who admitted she had quit work because of pregnancy without a leave of absence. The termination of employment was held to be voluntary.[95] The court has also affirmed the denial of benefits when the claimant had requested and been granted a leave of absence.[96]

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[88] Neff v. Board of Review, Bureau of Unemployment Compensation, 52 Ohio Op. 285, 117 N.E.2d 533 (1953).

[89] 117 N.E.2d at 533.

[90] OHIO REV. CODE ANN. § 4141.29(d)(2)(c) (1973 & Supp. I 1978). *Compare* Neff v. Board of Review, Bureau of Unemployment Compensation, 52 Ohio Op. 285, 117 N.E. 2d 533, 536 (1953) (employee who was laid off during maternity leave was not entitled to unemployment benefits from expiration of maternity leave until reinstatement in former employment) *with* Olin Mathieson Chem. Corp. v. Brown, 188 So.2d 157, 158 (La. Ct. of App. 1966) (employees on maternity leave filed for unemployment while still on leave).

[91] 119 N.E.2d at 537.

[92] *Id.* at 536.

[93] Luke v. Mississippi Employment Sec. Comm'n, 239 Miss. 292, 123 So.2d 231 (1960).

[94] MISS. CODE ANN. § 71-5-513(A) (1972) provides:

> An individual shall be disqualified for benefits: (1) For the week or fraction thereof, which immediately follows the day on which he left work voluntarily without good cause, if so found by the commission, and for each week thereafter until he has earned remuneration for personal services . . . equal to not less than eight (8) times his weekly benefit amount, as determined in each case, provided that marital, filial, and domestic circumstances and obligations shall not be deemed good cause within the meaning of this subsection.

The Mississippi Supreme Court has determined that certain domestic circumstances shall not be deemed good cause. *See, e.g.,* Donald v. Mississippi Employment Sec. Comm'n, 253 So.2d 534 (Miss. 1971) (husband's illness was domestic or marital obligation not good cause for unemployment); Mississippi Employment Sec. Comm'n v. Rakestraw, 254 Miss. 56, 61, 179 So.2d 830, 831 (1965) (that claimant "quit her job in a moment of pique during a brief misunderstanding" with her employer was not good cause); Mississippi Employment Sec. Comm'n v. Ballard, 252 Miss. 418, 422-24, 174 So.2d 367, 368-69 (1965) (claimant quit job without good cause because she could not arrange transportation); Mississippi Employment Sec. Comm'n v. Medlin, 252 Miss. 146, 152, 171 So.2d 496, 499 (1965) (voluntarily leaving employment to become self employed is leaving without good cause); Mississippi Employment Sec. Comm'n v. Stafford, 248 Miss. 95, 98, 158 So.2d 55, 56 (1963) (wife's illness not good cause).

The significance of obtaining a leave of absence to preserve the employment relationship emerges from the decisional law of jurisdictions other than Mississippi. Simply quitting work because of pregnancy has been determined to be voluntary unemployment,[97] and the claimant's physical condition has been viewed as stemming from "her own deliberate, voluntary act, and choice."[98] Even when a claimant requests a leave of absence, if none is granted, termination of the employment relationship is deemed to have occurred without good cause.[99] One Pennsylvania decision,[100] interpreting a statute which required that unemployment not stem from "voluntarily leaving work without cause of necessitous and compelling nature,"[101] supported the proposition that mere pregnancy was not sufficient cause.[102] Although the Pennsylvania statute was amended to provide that pregnancy was not deemed good cause for leaving work,[103] the Pennsylvania judiciary has continued the requirement that a pregnant claimant obtain a leave of absence to preserve her claim.[104]

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[95] The court found that the claimant left for marital or domestic reasons. 239 Miss. at 298, 123 So.2d at 234. *See also* Mills v. Mississippi Employment Sec. Comm'n, 228 Miss. 789, 795-97, 89 So.2d 727, 728-29 (1956) (union member refused to accept work at less than union wage; unemployment not involuntary).

[96] Franklin v. Mississippi Employment Sec. Comm'n, 242 Miss. 447, 450, 136 So.2d 197, 198 (1961).

[97] Moulton v. Iowa Employment Sec. Comm'n, 239 Iowa 1161, 34 N.W.2d 211 (1948).

[98] 34 N.W.2d at 213. The court looked at the overriding purpose of unemployment compensation for persons "unemployed through no fault of their own." *Id.; accord,* MISS. CODE ANN. § 71-5-3 (1972). The Iowa court rejected the definition of fault as "blameworthy, culpable or wrongful" but construed fault to mean "failure or volition." 34 N.W.2d at 217.

[99] Algiers Homestead Ass'n v. Brown, 246 La. 738, 167 So.2d 349, 352 (1964). *See also* Sandifer v. Administrator, Dept. of Employment Sec., 222 So.2d 587, 590 (La. Ct. of App. 1969) (claimant resigned with no discussion of pregnancy leave).

[100] Cirigliano v. Unemployment Compensation Bd. of Review, 191 Pa. Super. Ct. 420, 156 A.2d 363, 364 (1959); *accord,* Walsh v. Unemployment Compensation Bd. of Review, 197 Pa. Super. Ct. 108, 177 A.2d 19, 19-20 (1965) (employee left for pregnancy without requesting leave of absence); Hegley v. Unemployment Compensation Bd. of Review, 195 Pa. Super. Ct. 630, 171 A.2d 797, 798 (1961) (employee left without requesting leave); Flannick v. Unemployment Compensation Bd. of Review, 168 Pa. Super. Ct. 606, 82 A.2d 671, 673 (1951) (employee left for pregnancy without leave).

[101] PA. STAT. ANN. tit. 43, § 802(b) (Purdon 1964).

[102] 156 A.2d at 364. See note 89 *supra.*

[103] PA. STAT. ANN. tit. 43, § 802(b) (Purdon 1964) (1959 amendment).

[104] Fatica v. Unemployment Compensation Bd. of Review, 199 Pa. Super. Ct. 581, 186 A.2d 416, 417 (1962).

In way of comparison, the Mississippi Supreme Court has, in the past, commented that a grant of leave of absence is immaterial.[105] The court, as previously mentioned, has implied that with or without a leave of absence, a claim for benefits due to pregnancy will be denied.[106] While interpreting another provision of the disqualification statute,[107] the Mississippi court has stated, in dictum, that "a leave of absence is not mentioned by the statute and would not affect the result."[108]

During 1977, the Mississippi Supreme Court in *Smith v. Mississippi Employment Security Commission*[109] heard the appeal of a claimant who took a three month leave of absence for pregnancy with the understanding that she could return to work at the end of the leave, if work was available.[110] Before the three months passed, the employer notified the claimant that her job was being temporarily eliminated and that she was being laid off.[111] The Board of Review of the Mississippi Employment Security Commission ruled, and the circuit court affirmed, that the claimant was disqualified from benefits for the period following the three month leave since she had left work because of pregnancy and had thus left work voluntarily.[112]

The Mississippi court in *Smith,* however, reversed the Commission's finding and held that when an employer has agreed to a leave of absence for pregnancy with the understanding that the employee will return to work, the employee has not left work in order to terminate the employment relationship. If no work is available for the employee at the end of the leave of absence, then the employee has left work involuntarily and is entitled to unemployment compensation.[113]

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[105] Mississippi Employment Sec. Comm'n v. Stafford, 248 Miss. 95, 98, 158 So.2d 55, 56 (1963).

[106] See notes 95 & 96 and accompanying text *supra.*

[107] MISS. CODE ANN. § 97-5-513(a) (1972).

[108] 248 Miss. at 98, 158 So.2d at 56.

[109] 344 So.2d 137 (Miss. 1977).

In one decision by the Mississippi Supreme Court which did not merit textual discussion, Williamson v. Mississippi Employment Sec. Comm'n, 347 So.2d 978, 980 (Miss. 1977), the court determined that a school teacher, who previously had been employed annually and paid in twelve monthly installments, whose contract customarily had been formalized during the summer recess between regular terms, and who had not resigned, retired, or been terminated, but reasonably expected employment following the recess, had, at the beginning of the recess, an implied "contract" within the meaning of the Emergency Unemployment Compensation Act of 1974 and thus was ineligible for unemployment compensation.

The Emergency Unemployment Compensation Act is codified in I.R.C. § 3304(a)(6)(a) (1970). *Compare id.* § 3304(a)(6)(a) (requirements of a "contract" not specified) *with id.* § 3304(a)(6)(A) (1976) (reasonable assurance that such individual will perform services is required).

[110] 344 So.2d at 139.

[111] *Id.*

[112] *Id.* at 138.

The award of compensation benefits by the *Smith* court was especially proper in view of the claimant's efforts to preserve her employment.[114] The rationale of *Smith* combines the view that the unemployment resulted from "the then existing unavailability of work on the part of the employer,"[115] with the approach of many courts that the expectation of return to work was the result of an employer-employee agreement.[116] The court analyzed the intent of the parties and the events resulting from that intent, without actually considering the condition of pregnancy. Thus, the Mississippi court's previous statement that the terms of the disqualification statute are unaffected by a leave of absence is now meaningless dictum.[117] In its decision, the court necessarily overruled some prior decisions denying benefits[118] and fashioned a pragmatic interpretation of the phrase "voluntarily without good cause."[119] Still, where no agreement for return to work exists, benefits will continue to be denied.[120] The *Smith* holding places all leaves of absence on a common basis. Indeed, the court disregarded the cause of leave and looked to the actual cause of unemployment.[121]

III. CONCLUSION

In 1977, the Mississippi Supreme Court created a more equitable balance in the relationship existing between employers and employees under the state's workmen's compensation laws. By refusing to be restrained by rigid statutory language and by considering actualities rather than legalistic abstractions, the court extended statutory compensation to needy and qualified dependents of a deceased employee.[122] The court also made a significant advance by overruling several past decisions[123] and allowing compensation benefits to an employee forced to take a leave of absence from work because of pregnancy.[124] The Mississippi court should continue to balance the rights and obligations of parties within the employment situation and thereby create stability in the laws most closely affecting workmen in this state.

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[113] *Id.*

[114] *Id.* at 140-41.

[115] See notes 79 through 82 and accompanying text *supra.*

[116] See notes 83 through 85 and accompanying text *supra.*

[117] See notes 105 through 108 and accompanying text *supra.*

[118] See note 96 and accompanying text *supra.*

[119] 344 So.2d at 139.

[120] *Id.* at 140.

[121] *See* Whitehead v. Mississippi Employment Sec. Comm'n, 349 So.2d 1048, 1049 (Miss. 1977) (citing *Smith* holding that where employer became bankrupt while claimant was on pregnancy leave, cause of unemployment was bankruptcy).

MISS. CODE ANN. § 71-5-513(A)(1) (1972) was amended in 1977 to add the statement: "[P]regnancy shall not be deemed to be a marital, filial, or domestic circumstance for the purpose of the subsection." *Id.* (Supp. 1977). The amendment became effective after *Smith* and before *Whitehead*, but *Whitehead* made no mention of the change.

[122] See notes 65 through 74 and accompanying text *supra.*

[123] See note 118 and accompanying text *supra.*

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[124] See notes 109 through 121 and accompanying text *supra*.

CORPORATIONS AND COMMERCIAL LAW

This past year, the supreme court rendered few decisions of real precedential significance in the areas of corporate and commercial law. In the corporate area, the court merely reaffirmed and restated existing legal principles. In similar fashion, the court construed various sections of the Mississippi Uniform Commercial Code in decisions which, with scant exceptions, tended to comport with the construction given to the various sections by the framers who drafted the Code. The court, however, manifested an overall reluctance to construe the Uniform Commercial Code liberally.[1]

The rigidity of the Mississippi court's construction of certain sections of the Uniform Commercial Code paralleled the somewhat conservative approach taken by the court in dealing with business transactions in general. In one case that did not involve construction of Code sections, the court tenaciously adhered to the early common law doctrine prohibiting the raising, against a renewed note, of any defense of which the party knew at the time of the renewal.[2] This ruling is unnecessarily harsh and in no way reflects the reality of modern commercial transactions between uninformed consumers and sophisticated lending institutions. The decision exemplifies the conservative stance taken by the court in fashioning the decisional law governing modern commercial transactions in Mississippi.

I. Corporate Law

Under certain circumstances, a court is justified in ignoring the existence of a corporate entity to impose liability for corporate obligations upon those individuals hidden behind the corporate veil. In a case decided last year, the corporate veil was ignored altogether to prevent an unfair assessment of property values in an eminent domain action.[3] In another case, the 1977 supreme court refused to allow an incorporator to escape debts, incurred prior to incorporation, by hiding behind the corporate veil.[4] Though the cases dealt with factually distinct situations, the results stemmed from the application of common principles.

A. *Personal Liability of Incorporators*

Carolina Transformer Co. v. Anderson[5] concerned a situation in which Anderson, sole proprietor of a business, entered a consignment sales agreement with Carolina Transformer Company (Carolina), a North Carolina corporation.[6] Subsequent to the agreement, Anderson incorporated his business under the name of Transco Electric Supply Company (Transco). Notice of incorporation was never sent to Carolina, which continued to extend credit to Anderson under their original agreement.[7] Transco failed to file its annual report with the Secretary of State,[8] which resulted in suspension of its charter.[9] Nonetheless, Anderson continued doing business with Carolina. When Anderson's account with Carolina became delinquent by several months, both he and Transco were sued on the debt. The lower court, while awarding Carolina a judgment against Transco, exonerated Anderson as an individual defendant.[10] Carolina appealed, arguing that Anderson acted on behalf of a corporation without authority to do so and was, therefore, personally liable on the debt.[11]

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[1] See section II. *infra.*

[2] Citizens Nat'l Bank v. Waltman, 344 So. 2d 725, 728 (Miss. 1977).

[3] Highway Dev. Co. v. Mississippi Highway Comm'n, 343 So. 2d 477 (Miss. 1977).

[4] Carolina Transformer Co. v. Anderson, 341 So. 2d 1327 (Miss. 1977).

[5] *Id.*

Construing sections 79-3-189 and 79-3-285 of the Mississippi Code[12] for the first time, the Mississippi Supreme Court decided that once the corporate charter was suspended, the corporation was no longer functionally operative.[13] Anderson was, in effect, acting without authority of the corporation and was personally liable on the debt.[14]

The court then noted that Anderson had the responsibility of informing Carolina of the subsequent incorporation of his business.[15] Relying on *Guynn v. Brondum,*[16] a factually similar case, the *Anderson* court held that where an individual incurs personal liability in his capacity as sole proprietor of a business and later incorporates, failure by such person to notify the creditor of the subsequent incorporation will result in continued personal liability on the debt.[17] In *Anderson* there was no evidence indicating that Carolina had been put on notice of Anderson's incorporation.[18]

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[6] *Id.* at 1329. The sales agreement was apparently oral and covered consignment sales of electrical equipment to Anderson. At the time of the negotiation, Anderson was operating his business as a sole proprietor. *Id.*

[7] *Id.*

[8] *Id.* at 1328. MISS. CODE ANN. § 79-3-249 (Supp. 1977) sets forth the filing periods and required contents of the annual reports.

[9] 341 So. 2d at 1328. MISS. CODE ANN. § 79-3-189 (1972) provides for suspension of the corporate charter for failure to file an annual report. The secretary of state will serve notice of the delinquency on the corporation which will then have 90 days within which to file. *Id.* After the 90-day period has expired, notice of suspension is sent to the corporation and to the chancery clerk of the county where the corporation has its principal place of business. *Id.* The corporation then has twelve months within which it must file a report and pay a fine in order to have the suspension set aside. *Id.*

[10] 341 So. 2d at 1328.

[11] *Id.* at 1329. The argument made by appellant and subsequently adopted by the court, was that suspension of the charter for failing to file an annual report rendered the corporation inoperative for all purposes under MISS. CODE ANN. § 79-3-189 (1972). 341 So. 2d at 1330.

Appellant then turned to MISS. CODE ANN. § 79-3-285 (1972), which provides that one who assumes to act in behalf of a corporation without authority is personally liable for any debts incurred thereby, and argued that the suspension amounted to a revocation of Anderson's authority to act in behalf of the corporation. Hence, Anderson should be held personally liable. 341 So. 2d at 1330.

[12] MISS. CODE ANN. §§ 79-3-189, -285 (1972). See notes 9 & 11 *supra.*

[13] 341 So. 2d at 1330. See note 11 *supra.*

[14] 341 So. 2d at 1330.

Although it is unclear which of the above holdings was adopted by the court as the controlling rule of *Anderson,* the supreme court appears to have reached a proper result. Several early cases dealing with the predecessor of section 79-11-5,[19] requiring submission of a report of incorporation, construed the statute with similar results.[20] The Mississippi court has consistently held incorporators of defectively formed corporations personally liable for debts incurred in behalf of the corporation.[21] Hence, *Anderson* is consistent with prior holdings regarding failure of corporations to comply with statutory requirements.

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[15] *Id.* at 1329.

[16] 217 Miss. 243, 63 So. 2d 821 (1953). In this case, an Alabama partnership, prior to incorporating, incurred a debt with a Mississippi corporation. *Id.* at 246, 63 So. 2d at 823. After the partnership incorporated in Alabama, an action was brought against the individuals who as partners had incurred the debt. *Id.* at 246-47, 63 So. 2d at 823. The court noted the fact that the Mississippi corporation had never been notified of the subsequent incorporation of the partnership and refused to let the individuals escape their responsibility by hiding behind the corporate form. *Id.* at 247, 63 So. 2d at 823.

[17] 341 So. 2d at 1329.

[18] *Id.*

[19] Miss. Code Ann. § 79-11-5 (1972) requires filing of a report of incorporation within 60 days after organization. Its predecessor, Miss. Code § 930 (1906), provided that failure to file a report would result in "partnership" liability for the incorporators.

[20] In cases construing the statute the court routinely held officers, directors, and shareholders liable for corporate debts incurred when the report of incorporation was not timely filed. *See* Hessing-Ellis Drug Co. v. Wilkerson, 115 Miss. 668, 677, 76 So. 570, 571 (1917) (where plaintiff dealt with defectively incorporated company for several years and subsequently sued stockholders for debts owed by corporation, stockholders could not circumvent statute by asserting an estoppel against plaintiff); Ragland v. Doolittle, 100 Miss. 498, 506, 56 So. 445, 446 (1911) (where incorporators incur debt before filing period has expired and subsequently file a late report, late filing did not preclude their joint and several liability for debt). *But see* Natalbany Lumber Co. v. Countiss, 134 Miss. 511, 516, 521, 99 So. 262, 262, 264 (1924) (creditor who participated in bankruptcy proceedings of corporation precluded from asserting failure of corporation to file its initial report as grounds for holding officers jointly and severally liable for corporate debt). *See generally* 8 Miss. L.J. 205 (1935).

Although Miss. Code Ann. § 79-11-5 (1972) does not contain the language regarding "partnership" liability found in the earlier versions of the statute, it is suggested that § 79-3-285 will apply to impose such liability for violations of § 79-11-5. See note 7 *supra.*

[21] See note 20 *supra.*

As for the requirement that notice be sent to the creditor informing him that he must look to the corporation for payment, there appears to be no controlling statute.[22] However, the rule is certainly sound in that it protects the unsuspecting creditor who, after extending credit to a solvent individual, is faced ultimately with the problem of collecting from a bankrupt corporation. The creditor has a right to view the corporate records in order to determine the corporation's financial stability before extending credit. There is no legal requirement that credit must be extended to a corporation; thus, the creditor may look instead to the individual to whom he first extended credit for payment of the debt.

B. Piercing the Corporate Veil

The doctrine of piercing the corporate veil is a judicially created mechanism used to protect creditors by imposing personal liability on stockholders.[23] Using the doctrine in a variety of circumstances, the court has prevented some rather unfavorable results.[24] For example, the supreme court has held that a state agency is not free to ignore separate corporate identities when licensing the subsidiary of a foreign corporation.[25] Similarly, if a party entering into a contract to sell a business to a corporation has knowledge that he is dealing with the corporation rather than the individual stockholders, he will be estopped to deny the corporate existence in a suit for breach of contract.[26]

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[22] The *Guynn* court relied upon the case authority of Credit Indus. Co. v. Adams County Lumber & Supply Co., 215 Miss. 282, 60 So. 2d 790 (1952) and Polk v. Oliver Finnie & Co., 56 Miss. 566 (1879). In *Credit Indus. Co.*, the court held a withdrawing partner would be liable for partnership debts unless creditors were given notice of the withdrawal and consented to release the withdrawing partner from liability. 215 Miss. at 294, 60 So. 2d at 795-96. The court in *Polk* required public notice of the change of a partnership's name, rather than just private notice to creditors. 56 Miss. at 569-70. The *Guynn* court failed to cite Batson v. C.L. Thompson Land & Lumber Co., 92 Miss. 199, 45 So. 985 (1908), a case which strongly supports the principle that creditors are entitled to notice of change in the condition of a business entity by holding that creditors are entitled to notice upon dissolution of a partnership. *Id.* at 202-03, 45 So. at 985-86.

[23] Hodge & Perry, *The Model Business Corporation Act: Does the Mississippi Version Lime the Bushes?*, 46 MISS. L.J. 371, 376 (1975).

[24] See note 37 *infra.*

[25] Johnson & Higgins, Inc. v. Commissioner, 321 So. 2d 281, 284 (Miss. 1975). The Commissioner of Insurance had refused to give a license to Johnson & Higgins on the ground that it was a wholly owned subsidiary of a New Jersey corporation, which had refused to supply the commissioner with a shareholder's list. *Id.* at 282-83. The commissioner claimed that the list was necessary to assure compliance with MISS. CODE ANN. § 83-21-15 (1972), which deals with regulation of nonresident brokers or agents. 321 So. 2d at 283. The court noted that to demand the list was to deny the separate identities of the two corporations and, absent a showing that the ends of justice were being subverted, the separate existences must be honored. *Id.* at 284-85.

[26] Wood v. Gulf States Capital Corp., 217 So. 2d 257, 264 (Miss. 1968).

In another context, the Mississippi judiciary has dealt on several occasions with the issue of whether the separate identities of a parent and subsidiary corporation are to be acknowledged.[27] In one instance, the court refused to extend long-arm jurisdiction to a foreign parent corporation, rejecting the parent's contention that ownership of a Mississippi subsidiary constituted doing business in Mississippi.[28] In still another context, where both parent and subsidiary were Mississippi corporations, the court refused to disregard the separate existence of the parent to allow a defendant to assert breach of contract by the subsidiary as a defense in a suit by the parent.[29] The court reached this result even though the suit arose from the defendant's prior dealings with the subsidiary[30] and the parent and subsidiary shared the same office building, employees, officers, and directors.[31] The supreme court, adamant in its refusal to ignore a parent corporation's separate existence to impose liability for the subsidiary's debts,[32] has likewise refused to hold the parent liable in tort for the negligence of the subsidiary's employees.[33] Thus, in a variety of contexts, the court has indicated that, absent a clear showing that the corporate form is being used to subvert justice, the corporate entity will not be disregarded.[34]

Although the 1977 court did not discuss the doctrine of piercing the corporate veil[35] in *Carolina Transformer Co. v. Anderson,*[36] it nevertheless reached a result consistent with the general notion that courts will not allow the corporate form to be invoked for inequitable purposes.[37] Equitable considerations also guided the court in *Highway Development Co. v. Mississippi State Highway Commission.*[38] This case, before the court on eminent domain issues,[39] was basically a confrontation with the problem of abuse of the corporate form.

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[27] *See* Murdock Acceptance Corp. v. Adcox, 245 Miss. 151, 163-64, 138 So. 2d 890, 895-96 (1962) (ordinarily, two corporations are separate and distinct entities).

[28] Republic-Transcon Indus., Inc. v. Templeton, 253 Miss. 132, 175 So. 2d 185 (1965). In this case a foreign corporation had acquired all of the stock and assets of a Mississippi corporation which was operated as a subsidiary. The court held that the mere fact that one corporation owns all of the stock in a second corporation does not make the second corporation an agent for its parent. Hence, the act of doing business in Mississippi on the part of the subsidiary is not imputable jurisdiction. *Id.* at 141, 175 So. 2d at 188.

[29] James B. Berry Sons' Inc. v. Owen, 176 Miss. 562, 570-71, 169 So. 685, 686-87 (1936).

[30] *Id.* at 568-70, 169 So. at 686. The case involved a contract for sale of lubricating oil. The subsidiary corporation sent the buyer some inferior stock. When the buyer complained, the parent sent additional oil to be blended with the inferior stock so as to bring it up to grade. The blending did not work and the buyer refused to pay the parent for the additional oil. *Id.*

[31] *Id.* at 570, 169 So. at 687.

[32] *E.g.,* Republic-Transcon Indus., Inc. v. Templeton, 253 Miss. 132, 141, 175 So. 2d 185, 188 (1965); Adler v. Interstate Trust & Banking Co., 166 Miss. 215, 232, 146 So. 107, 111 (1933).

[33] Louis Werner Sawmill Co. v. Northcutt, 161 Miss. 441, 448-50, 134 So. 156, 157-58 (1931).

[34] Murdock Acceptance Corp. v. Adcox, 245 Miss. 151, 163-64, 138 So. 2d 890, 895-96 (1962). For applications of the principle in other jurisdictions, see Hamilton, *The Corporation Entity,* 49 TEX. L. REV. 979 (1971).

[35] *See generally* Hodge & Perry, *supra* note 23, at 376 (brief discussion of the doctrine); 18 MISS. L.J. 327 (1947) (discussing application of the doctrine to corporations set up for tax avoidance purposes); 3 MISS. L.J. 152 (1930) (discussing alter ego theory as applied to personal holding companies).

[36] 341 So. 2d 1327 (Miss. 1977).

Highway Development Company owned a parcel of land which was being condemned for highway right of way.[40] The officers of the company formed a separate corporation with their wives as principal stockholders[41] and conveyed part of the land owned by Highway Development to the new corporation. Their purpose was to inflate the value of the land artificially by carving it up into two parcels.[42] Highway Development Company, however, was unable to achieve this result and subsequently appealed the assessment.

On appeal, the supreme court summarily dismissed the existence of the newly formed corporation, noting that while piercing the corporate veil is not to be taken lightly, the corporate form would nevertheless be disregarded where its purpose is to "subvert the ends of justice."[43] As in *Carolina Transformer Co. v. Anderson,*[44] the court refused to allow use of the corporate form to override equitable and legal considerations. The reasoning of the court in *Highway Development* is consistent with that of past decisions. Although it represents an instance when the veil was pierced, the evidence clearly supported the result.[45]

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[37] An excellent example of the application of the doctrine by the Mississippi court can be found in Southern Elec. Sec. Co. v. State, 91 Miss. 195, 44 So. 785 (1907). In that case the state claimed a securities holding company constituted an illegal voting trust and represented an unlawful monopoly. *Id.* at 197, 44 So. at 786. In upholding an injunction against the voting of the holding company's shares in other companies, the court recognized the duty to overlook compliance with formalities and examine the substantive reasons for incorporation. Specifically, the court noted that one cannot invoke the fiction that the corporation is an entity apart from its stockholders, when to do so would subvert the ends of justice. *Id.* at 207, 44 So. at 790. Accordingly, the corporate veil was pierced to reveal the underlying illegality of its purpose. *Id.; accord,* Urschel v. Stone, 198 Miss. 105, 109-10, 21 So. 2d 466, 467-68 (1945) (doctrine applied to a corporate liquidation distribution to prevent a shareholder from asserting a greater basis in corporate assets for tax purposes).

[38] 343 So. 2d 477 (Miss. 1977).

[39] *Id.* at 479, 481.

[40] *Id.* at 478.

[41] *Id.* at 478, 480.

[42] *Id.* at 480.

[43] *Id.*

[44] 341 So. 2d 1327 (Miss. 1977).

[45] The testimony in the court below revealed the close relationship between Highway

II. COMMERCIAL LAW[46]

A. *Banks and Banking*

The spirit of the Uniform Commercial Code is perhaps best stated in section 75-1-203 of the Mississippi Code,[47] which provides that "every contract or duty within this code imposes an obligation of good faith in its performance or enforcement."[48] At least one court's interpretation of this section has held that the provision imposes a "general requirement of fundamental integrity on commercial transactions regulated by the Code."[49] Even though there were no contractual relationships existing between the two banks in that instance, it is well settled that the good faith provisions of the Code were meant to apply to all commercial transactions coming within its purview.[50]

Noted in this section of the review is a case in which the Mississippi Supreme Court reached a result inconsistent with the policy underlying the good faith requirements of the Uniform Commercial Code. The court announced a rule of law for which it cited no authority and for which it provided no justification, other than a rather bland statement that competing banks owe no duty to inform one another of a fraudulent scheme affecting both banks. The decision sanctions one bank's profiteering, at the expense of another, with full knowledge that the second bank is being defrauded.

Citizens National Bank v. First National Bank[51] concerned a check-

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Development Corporation and the newly formed corporation to which the parcel of land had been conveyed. It was apparent from the testimony that the purpose of creating the new corporation and conveying the parcel to it was to inflate artificially the land values in the eminent domain proceedings. 343 So. 2d at 480-81.

[46] The following cases involving several areas of commercial law will not be reviewed in this section: (1) Banks and Banking: Lister v. Bank of Lucedale, 349 So. 2d 1056, 1058 (Miss. 1977) (in suit by bank on promissory note, trial court wrongfully denied defendant's counterclaim); (2) Sales: Chaney v. G.M.A.C., 349 So. 2d 519, 522 (Miss. 1977) (correct measure of damages for breach of warranty is the difference in value between the goods as accepted and the value they would have had if they had been as warranted); Crocker v. Sears Roebuck & Co., 346 So. 2d 921, 923 (Miss. 1977) (in an action for breach of warranty wherein special damages are sought for injuries sustained by plaintiff, the plaintiff bears the burden of proving that the defects in the product proximately caused the injury); Allstate Ins. Co. v. Estes, 345 So. 2d 265, 266 (Miss. 1977) (a thief cannot pass title to goods, even to a bona fide purchaser); (3) Secured Transactions: I.T.T. Indus. Credit Co. v. Robinson, 350 So. 2d 48, 50-52 (Miss. 1977) (mechanic's lien takes precedence over a secured party when debtor returns possession of goods to lienholder); Thorp Commercial Corp. v. Mississippi Road Supply Co., 348 So. 2d 1016, 1018 (Miss. 1977) (same).

[47] MISS. CODE ANN. § 75-1-203 (1972).

[48] *Id.*

[49] Skeels v. Universal C.I.T. Credit Corp., 335 F.2d 846, 851 (3d Cir. 1964).

[50] *Id.* See note 60 *infra.*

[51] 347 So. 2d 964 (Miss. 1977).

kiting scheme which at its peak involved over $700,000.[52] A Mr. Duran had checking accounts at Citizens National Bank (CNB) and First National Bank (FNB). By prearranged plan, Duran would draw a check on one bank and deposit it in the other. Before the check could clear the drawee bank, Duran would deposit therein a check drawn on his account in the depositary bank. Rarely did the accounts in either bank have proceeds sufficient to cover the checks.[53]

The kiting scheme extended over several months[54] until FNB discovered Duran's fraudulent activity.[55] FNB thereupon refused to honor checks which Duran had drawn on it and deposited in his CNB account. At the same time, however, FNB continued to collect checks drawn by Duran on his CNB account and deposited in the FNB account. CNB continued to honor the checks until it discovered the kiting scheme.

CNB subsequently brought suit in the Chancery Court[56] of Hinds County against FNB. The bill of complaint alleged that FNB owed a duty to CNB to inform it of the kiting scheme and to cease accepting payment for the checks drawn on the CNB account.[57] On appeal to the Mississippi Supreme Court from an order sustaining a demurrer to the bill, FNB was held to be under no duty to apprise CNB of the kiting scheme.[58] CNB's continued payment of the checks against the insufficient funds in Duran's account were held to be extensions of credit by the bank to its customer with the bank's only recourse being against its customer for payment.[59]

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[52] *Id.* at 966.

[53] *Id.* Due to the provisional credits to each account pending clearance of deposited checks, the accounts appeared to have sufficient funds to cover the items drawn on them. This fact, of course, made it difficult to detect the kiting scheme, since new deposits and additional provisional credit were charged to the respective accounts before the checks could clear the banks. Thus, while the actual amount of proceeds in either account would not be sufficient to cover the checks, the provisional credits made it appear as though sufficient funds were either on hand or immediately forthcoming. *Id.* Furthermore, even if this were not the case, the banks were free to pay on a customer's checks even where so doing would result in overdrafts. MISS. CODE. ANN. § 75-4-401 (1972). Under the Uniform Commercial Code, paying checks on provisional credits or as overdrafts is acceptable banking practice and amounts to a "loan" to the customer by the bank. *See* State v. Mullin, 325 N.W.2d 305, 308 (Iowa 1975) (payment creating overdraft is merely an extension of credit). *See generally* MISS. CODE ANN. §§ 75-4-201 to -214 (1972) (regarding collection of items by depository and collecting banks).

[54] 347 So. 2d at 966. CNB alleged that the scheme began in February, 1974, and peaked during the first week of April when FNB allegedly discovered the scheme. *Id.*

[55] *Id.* It is not clear exactly how FNB discovered the scheme. However, since FNB admitted the allegations in the bill of complaint by way of a general demurrer, there is no doubt that it was aware of the kiting scheme and failed to inform CNB. *Id.* at 966-67.

[56] The suit was originally filed in Circuit Court of Hinds County and on motion of FNB was transferred to Chancery Court. *Id.* at 966.

[57] *Id.* The specific allegations were that by accepting payment from CNB with full knowledge of the kiting scheme, FNB was wrongfully converting CNB funds to its own use. *Id.* FNB was applying the proceeds to debts owed to it by Duran. *Id.* The chancellor, in ruling on the demurrer, stated that he failed to see where FNB was charged with anything "other than acting as a prudent and careful bank should act." *Id.* at 967.

The most interesting and somewhat annoying aspect of this case was the court's disregard of the "good faith" requirements of the Code.[60] While it is true that there were no contractual obligations existing between the two banks, and certainly no fiduciary relationship, the self-serving behavior of FNB at the expense of CNB would nonetheless seem to violate the spirit, if not the letter, of the Uniform Commercial Code.[61]

It is disturbing that the court cited no authority for its conclusion that FNB was free to profit at the expense of CNB. The only case cited by the court[62] was one which dealt with the application of the rule of *Price v. Neal.*[63] Simply stated, the rule espoused in that case is that where a collecting bank pays on a forged instrument and later receives proceeds from the drawee, the drawee cannot recover those proceeds upon discovery of the forgery.[64] The rule does not apply to checks paid on forged indorsements,[65] or to checks paid in bad faith.[66]

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[58] *Id.* at 967. Specifically, the court noted that the two banks were competitors in the banking field and that competing banks generally deal with each other at arm's length. Since there was no fiduciary relationship existing between the banks, the court concluded that FNB owed no duty to CNB to inform it of the kiting scheme. *Id.* No authority for this proposition was cited by the court.

[59] *Id.* In this regard the court held that CNB had until its midnight deadline, as defined in Miss. Code Ann. § 75-4-104(1)(h) (1972), to revoke the settlements given for the checks. 347 So. 2d at 967. The court further noted that when CNB paid these checks it was either because Duran had sufficient funds in his account, or because the bank chose to extend him credit, in which case it could look only to its customer for payment. *Id.* at 967-68. At one point in the opinion the court made the rather remarkable statement that CNB had not alleged that had it known of the kiting scheme it would have stopped cashing the checks. *Id.* at 968. It would appear that by filing suit CNB clearly indicated what it would have done had it known of the fraud.

[60] Miss. Code Ann. § 75-1-203 (1972) lays down a general rule that all parties to commercial transactions covered by the Uniform Commercial Code are impressed with a duty to act in good faith. In the official comment to this section, the reporters have stated that "[t]his section sets forth a basic principle running throughout this Act. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties." U.C.C. § 1-203, Comment 19 (1972 version). "Good faith" is defined in Miss. Code Ann. § 75-1-201 (19) (1972) as being "honesty in fact in the conduct or transaction concerned." *Id.* The drafters of the Code noted in the official comment that good faith simply means what the Code says it means—honesty. U.C.C. § 1-201 (19), Comment 19 (1972 version).

[61] *See* Miss. Code Ann. § 75-1-201 (1972) (good faith means "honesty in fact in the conduct . . . concerned"). By accepting checks with full knowledge of Duran's activities, FNB was not only apparently violating the good faith requirements, but was itself engaging in the fraud. Evidently, this was what counsel for CNB meant when it charged FNB with unlawful conversion of CNB funds. 347 So. 2d at 966.

[62] First Nat'l Bank v. Deposit Guar. Bank & Trust Co., 247 Miss. 765, 156 So. 2d 814 (1963).

[63] 3 Burr. 1354, 97 Eng. Rep. 871 (1762).

The rule in *Price v. Neal* has been codified in section 75-3-418 of the Mississippi Code[67] to provide a means of finalizing commercial transactions and preventing commercial paper transactions from being reopened after a settlement.[68] The problem here, however, is that FNB cannot be said to be a holder in due course of the checks drawn on Duran's CNB account.[69] According to the rule as codified, "payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment."[70] It is difficult to understand the applicability of the provisions of section 75-3-418 in the instant case.[71] After all, one of the requirements for holder in due course status is that the party must have acted in good faith.[72] Since "good faith" is defined in the Code as "honesty in fact in the conduct or transaction concerned,"[73] it is inconceivable that anyone would view FNB's actions in the instant case as honest and above-board. If one accepts the view that FNB was not a holder in due course, then the "finality" rule in *Price v. Neal*,[74] as codified in section 75-3-418,[75] simply does not apply in the instant case. It is clear that CNB was within its rights to revoke the settlements upon discovery of Duran's fraudulent scheme.[76]

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[64] *Id.* at 1358-59, 97 Eng. Rep. at 872. The rule is codified at MISS. CODE ANN. § 75-3-418 (1972), which provides:

> Except for recovery of bank payments as provided in the chapter on Bank Deposits and Collections (Chapter 4) and except for liability for breach of warranty on presentment under section 75-3-417, payment or acceptance of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

Id.

[65] MISS. CODE ANN. § 75-3-418 (1972). The reference here is to liability for breach of warranty under *id.* § 75-3-417.

[66] *Id.* § 75-3-418. The rule allows a drawee bank to recover proceeds remitted to a depository or collecting bank which acted in bad faith in cashing the checks. That is, where the collecting bank did not have the status of a holder in due course, final payment can still be revoked by the payor bank even though the midnight deadline has passed. U.C.C. § 3-418, Comment b (1972 version). The court, without citing MISS. CODE ANN. § 75-3-418 (1972), addressed itself to this problem, but held that since the policy of the rule is that commercial transactions should be finalized once the midnight deadline had passed, CNB's right to revoke settlements for the kited checks was cut off. 347 So. 2d at 968. The problem, of course, is that FNB would have difficulty establishing itself as a holder in due course when it paid on the checks. MISS. CODE ANN. § 75-3-302 (1972). It admitted having notice of Duran's fradulent kiting scheme and its continued receipt of settlement for the kited checks certainly cannot be construed as "honesty in fact" in its dealings with CNB. *See generally* U.C.C. § 3-418, Comments 3-5 (1972 version).

[67] MISS. CODE ANN. § 75-3-418 (1972). See note 52 *supra.*

[68] U.C.C. § 3-418, Comment 1 (1972 version). The official comment states, "[I]t is highly desirable to end the transaction on an instrument when it is paid rather than reopen and upset a series of commercial transactions at a later date when the forgery is discovered." *Id.*

[69] See note 66 *supra*. The official comment to U.C.C. § 3-418 (1972 version) states unequivocally that if the holder "has taken the instrument in bad faith or with notice he has *no equities* as against the drawee." *Id.* Comment 3 (emphasis added). *See generally* J. BRADY, THE LAW OF BANK CHECKS § 11.8 (4th ed. 1969). Brady notes, "[A]s a general rule, where a payor bank pays an overdraft check to one who presents it in good faith, the bank will not be permitted to recover the money so paid from the person receiving payment." *Id.* § 11.8, at 340. He then points out that a person who obtains payment of a check with knowledge that the instrument is an overdraft may be required to restore the payment received. *Id.* § 11.8, at 341. A case on point is First State Bank & Trust Co. v. George, 519 S.W.2d 198 (Tex. Ct. App. 1974). In that case a collecting bank had actual knowledge of a check kiting scheme involving the payee of several checks. The checks were dishonored and the bank sought to recover as against the drawers. The court denied recovery on the ground that the collecting bank had acted in bad faith by taking the

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checks with knowledge of the kiting scheme. Thus, it was denied holder in due course status. *Id.* at 203. *But see* Community Bank v. United States Nat'l Bank, 276 Or. 471, 555 P.2d 435, 440 (1976) (mere suspicion that kiting scheme is in operation is not enough to preclude finding of good faith on part of collecting bank).

[70] MISS. CODE ANN. § 75-3-418 (1972). See notes 64 & 69 *supra*.

[71] The court, as mentioned in note 66 *supra*, did not address itself specifically to MISS. CODE ANN. § 75-3-418 (1972). The court merely said:

> [It is] a well settled rule that unless the payment of a check is induced by fraud or misrepresentation on the part of the holder, such payment closes the transaction insofar as the bank and the holder of the check are concerned and the bank cannot recover back the amount paid.

347 So. 2d at 968.

[72] MISS. CODE ANN. § 75-3-302(1)(b) (1972).

[73] *Id.* § 75-1-201(19). See note 59 *supra*.

[74] 3 Burr. 1354, 1358-59, 97 Eng. Rep. 871, 872 (1762).

[75] MISS. CODE ANN. § 75-3-418 (1972).

[76] *See* Mid-Continent Nat'l Bank v. Bank of Independence, 523 S.W.2d 569, 575 (Mo. Ct. App. 1975). *Mid-Continent* involved a factual situation with interesting parallels to the instant case. The case concerned a bank employee who had been pilfering funds. She attempted to cover up her defalcations by purchasing a cashier's check from Mid-Continent in the amount of the stolen funds, using her personal check which was an overdraft on her account at the Bank of Independence. A fellow employee accepted the cashier's check knowing that it had been paid for with a check drawn against insufficient funds. The Bank of Independence later received payment for the cashier's check and returned the check given therefor by the employee for lack of sufficient funds. *Id.* at 571. Mid-Continent sued to recover the proceeds paid on the check. On appeal, the Missouri appellate court held that the Bank of Independence had "notice" that the cashier's check had been obtained by fraud and was therefore not a holder in due course. *Id.* at 575. The court then cited MO. REV. STAT. § 2400.3-418 (1969) and held that notwithstanding Mid-Continent's seeking to revoke the settlement after the midnight deadline, it was entitled to recover against the Bank of Independence since the latter was not in fact a holder in due course. 523 S.W.2d at 575.

The Missouri court's interpretation of § 3-418 was proper. Although the factual situation was different in many respects from the *Citizens National Bank*, it nevertheless involved a situation where a bank, with knowledge that a fraudulent scheme was afoot, The refusal of the court to address itself to the "good faith" issue in this case is truly disappointing. The effect of the holding is to allow a wrongdoer to profit from his miscreant acts. At the very least, this holding violates one of the more sacred maxims of equity—"He who comes into equity must come with clean hands."[77] If the court could not find a specific Code provision to cover FNB's conduct, then it was free to resort to equitable principles to reach the proper result. As provided in section 75-1-103 of the Mississippi Code, "Unless displaced by particular provisions of this code, the principles of law and equity . . . shall supplement its provisions."[78] Surely equity commands a different result than the one obtained in *Citizens National Bank.*

B. Bills and Notes

In the area of commercial paper, only two cases rendered last year were worthy of commentary. One case, concerning defenses against a holder in due course of a promissory note, involved nothing more than a straightforward reading of the pertinent Code sections.[79] The supreme court also dealt with waiver of a cause of action for fraud in the procurement of a note and deed of trust.[80] Resting upon an opinion based on logic outside the ambit of the Uniform Commercial Code, the decision of this case produced some rather harsh results which could easily have been avoided.

1. Fraud in the Factum

There are very few defenses available against a holder in due course.[81] Prior to the adoption of the Uniform Commercial Code in Mis-

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attempted to profit at the expense of another bank which had no knowledge of the fraud. This is essentially what FNB was doing in the instant case, and it is suggested that a proper application of MISS. CODE ANN. § 75-3-418 (1972) would have resulted in an entirely different outcome. See note 57 *supra.*

[77] *See generally* V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 42, at 43 (2d ed. 1950).

[78] MISS. CODE ANN. § 75-1-103 (1972).

[79] Ricks v. Bank of Dixie, 352 So. 2d 798 (Miss. 1977).

[80] Citizens Nat'l Bank v. Waltman, 344 So. 2d 725 (Miss. 1977).

[81] MISS. CODE ANN. § 75-3-305 (1972) provides:

> To the extent that a holder is a holder in due course he takes the instrument free from
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> (1) all claims to it on the part of any person; and
>
> (2) all defenses of any party to the instrument with whom the holder has not dealt except
>
> (a) infancy, to the extent that it is a defense to simple contract; and
>
> (b) such other incapacity, or duress, or illegality of the transaction, as renders the obligation of the party a nullity; and
>
> (c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge

sissippi,[82] fraud in the factum was generally not available unless extreme circumstances were shown.[83] In this regard, the Uniform Commercial Code is no more lenient in application of the defense than the Mississippi court has been in its earlier decisions.[84]

Section 75-3-305(2)(c) of the Mississippi Code[85] now provides that fraud in the factum is a good and valid defense against a holder in due course.[86] Last year, in *Ricks v. Bank of Dixie,*[87] the Mississippi Supreme Court, in applying the "excusable ignorance" test suggested in the official comment to section 3-305 of the Uniform Commercial Code,[88] re-

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of its character or its essential terms; and

(d) discharge in insolvency proceedings; and

(e) any other discharge of which the holder has notice when he takes the instrument.

[82] 352 So. 2d at 800 n.1. Prior to the adoption of the Uniform Commercial Code, Mississippi operated under the UNIFORM NEGOTIABLE INSTRUMENTS ACT. The latter was repealed when the Uniform Commercial Code became effective on March 31, 1968. Act of May 31, 1966, 1966 Miss. Laws ch. 316, § 10-102.

[83] 352 So. 2d at 800; *see* Cedar Rapids Nat'l Bank v. Rhodes, 96 Miss. 700, 702, 51 So. 717, 718 (1910) (absent showing of fraud in the execution, the holder in due course takes free of all defenses available to the maker as against an original party to the note); *cf.* Hattiesburg Prod. Credit Ass'n v. McNair, 193 Miss. 615, 625-26, 10 So. 2d 97, 101-02 (1942) (fact that loan check was procured by imposter is no defense against a subsequent holder in due course); Hall v. Box, 131 Miss. 218, 232, 94 So. 221, 223 (1922) (negligence on the part of a maker in signing and delivery will defeat any right that he may claim or attempt to set up in defense against a holder in due course).

These earlier cases are consistent with current Code provisions and their application as suggested by the reporters. *See generally* U.C.C. § 3-305, Comments 1-9 (1972 version); *see also* 2 R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 3-305:27, 34-36 (2d ed. 1971).

[84] See note 83 *supra.*

[85] MISS. CODE ANN. § 75-3-305(2)(c) (1972).

[86] *Id.* Fraud in the factum, or fraud in the essence as it is sometimes called, arises where the maker or endorser of an instrument is tricked or cajoled into signing it without knowledge of its contents, and without a reasonable opportunity to determine its contents. The defense usually arises where maker or endorser is illiterate and is led to believe that he is signing a receipt or invoice. The rationale for the defense is that the party so signing never intended to make such a contract, or to sign that type of document. U.C.C. § 3-305, Comment 7 (1972 version).

[87] 352 So. 2d 798 (Miss. 1977).

[88] *Id.* at 800. Comment 7 provides in part:

> The test of the defense . . . is that of excusable ignorance of the contents of the writing signed. The party must not only have been in ignorance, but must also have had no reasonable opportunity to obtain knowledge. In determining what is a reasonable opportunity all relevant factors are to be taken into account, including the age and sex of the party, his intelligence, education and business experience; his ability to read or to understand English, the representations made to him and his reason to rely on them or to have confidence in the person making them; the presence or absence of any third person who might read or explain the instrument to him, or any other possibility of obtaining independent information; and the apparent necessity, or lack of it, for acting without delay.

jected as untenable a defense against a holder in due course that the defendant had been "tricked" into endorsing a promissory note.[89]

In a suit on a promissory note, Ricks offered the defense that his signature on the note was made in the course of his business in the belief that the note was in fact an order for equipment.[90] A favorable judgment for the Bank of Dixie, the holder of the note,[91] resulted in an appeal. The Mississippi Supreme Court rejected Ricks' defense, taking special note of the fact that he was an educated man with much business experience.[92] The court refused to allow Ricks to set up his own negligence in failing to read the note as a valid defense.[93]

The court's application of section 75-3-305[94] in *Ricks* appears to be consistent with both the construction accorded that section by the framers of the Uniform Commercial Code[95] and the common law rules surrounding fraud in the factum. This bolsters the rationale underlying the holder in due course doctrine that where two "innocent" parties are involved, the loss should fall on the one who set the transaction in motion.[96] Thus, since Ricks, by his own negligence, set the transaction in motion, it is only proper that he bear the loss.[97]

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[89] 352 So. 2d at 800-01. It was indeed difficult to see how the defendant had been "tricked" in the instant case. Apparently he signed numerous documents for his business without reading them. The note in question was one such document. *Id.* at 801.

[90] *Id.* at 799, 801.

[91] Ricks also attacked Bank of Dixie's status as a holder in due course. The note had been executed to Dixie Machine Works and was purchased by the Bank. Ricks alleged that the Bank and Dixie Machine Works had conspired in an effort to defraud him. No proof, however, was offered of the allegation. On appeal, the court dismissed this assertion and, by a rather mechanical application of pertinent Code provisions, held that Bank of Dixie was in fact a holder in due course. *Id.* at 800-01.

[92] *Id.* at 801.

[93] *Id.*

[94] MISS. CODE ANN. § 75-3-305 (1972).

[95] See note 88 *supra.*

[96] *See* Bank of Newton v. Simmons, 96 Miss. 17, 18, 49 So. 616, 617 (1909) (where one of two innocent parties must suffer loss, the loss must fall on the one whose act made it possible for the other to be defrauded).

[97] Long before the advent of the U.C.C., the Mississippi Supreme Court recognized the potential inequities in a strict application of the holder in due course doctrine:

> We have witnessed the great hardship produced by the application of the strict law merchant, to the transactions of plain illiterate men . . . who take and transfer notes without any reference to the strict conditions imposed by the law governing such transfers. But we cannot very well graduate the system, and bring it in adaption to the various degrees of intelligence and facilities in different parts of the country, and perhaps we have more to dread, from untried innovations, than from unequal, but known and settled principles.

Chanee v. Right, 1 Miss. (1 Walker) 156, 156 (1824). For an excellent contemporary criticism of the holder in due course doctrine as applied to consumer transactions, see 43 MISS. L.J. 228 (1972).

2. Waiver of Cause of Action by Maker of Promissory Note

In *Citizens National Bank v. Waltman,*[98] Evelyn Waltman, at the behest of her husband and a bank loan officer, agreed to pledge her separately owned farm as "interim" security for a loan made to her husband.[99] Pursuant to this transaction, some stock owned by her husband was to be transferred from a Louisiana bank to Citizens National Bank to serve as permanent security for the loan. Upon the arrival of this stock, Mrs. Waltman's farm was to be released. The stock, however, proved to be worthless.[100]

At the bank's request and apparently with full knowledge of all the circumstances surrounding the transaction, Mrs. Waltman executed a number of renewal notes, receiving an extension of time with each renewal.[101] She eventually defaulted and the bank foreclosed, selling her farm to retire the debt. In a suit seeking damages for the alleged fraud practiced upon her by the bank, Mrs. Waltman recovered a favorable verdict from which the bank appealed.[102] On appeal, the Mississippi Supreme Court reversed and rendered, holding in substance that renewal of a note originally procured by fraud constitutes a waiver of any cause of action against the payee, if the maker has full knowledge of the fraud at the time of renewal.[103]

Serving merely to reinforce this jurisdiction's stand on a well settled principle,[104] *Waltman* offers very little to Mississippi jurisprudence.

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[98] 344 So. 2d 725 (Miss. 1977).

[99] *Id.* at 726-27. The proceeds of the loan were used to satisfy her husband's indebtedness to a Louisiana bank as well as to satisfy earlier loans made to him and Mrs. Waltman by Citizens National Bank. After satisfying these debts they received $10,000 in cash for their note of $22,445.40. *Id.* at 727.

[100] *Id.*

[101] *Id.* After the initial loan transaction, Mrs. Waltman's husband incurred further debts at the bank. In the meantime the couple had separated and the additional loans were made after the first loan had become delinquent. The renewal notes executed by Mrs. Waltman were conditioned upon her accepting responsibility for the additional debts incurred by her husband. *Id.*

[102] *Id.* The jury awarded her a verdict of $102,000. The judge ordered a remittitur of $32,000, which was accepted by Mrs. Waltman. *Id.* at 726-27.

[103] *Id.* at 728.

[104] The rule was established by the Superior Court of Chancery in the early case of Pintard v. Martin, 9 Miss. (1 S. & M.) 126 (1843). In that case a purchaser of a sawmill was deceived into believing that certain parcels of land adjacent to the mill were included in the sale. It was later learned that not only were the disputed parcels not included, but also the vendor did not have perfect title to the mill itself. *Id.* at 133. Despite his knowledge of these facts, the purchaser on several occasions renewed notes which he had given under the contract of sale. *Id.* at 133-34. In a later suit by the purchaser for rescission, the chancery court denied relief on the ground that the renewals were made with full knowledge of the original fraud and that under such circumstances equity could provide no relief. *Id.* at 134.

Such consistency is desirable inasmuch as it ensures predictability and reliability in decision-making. Despite this fact, however, the court's holding accomplishes a harsh result.[105] To hold that mere knowledge of

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The rule in *Pintard* was subsequently followed in Edwards v. Roberts, 15 Miss. (7 S. & M.) 544 (1846), which likewise involved a suit for rescission of a land sale contract. In that case the parties had agreed to arbitrate a dispute about the quality of the land. *Id.* at 555. Pursuant to the arbitration agreement, the buyer renewed the notes given and reaffirmed his obligations on the contract. *Id.* at 556. Once again the court denied relief, holding that if a party has knowledge of fraud and yet subsequently performs acts in affirmance of the original contract—renewing notes and entering new agreements—he thereby waives the fraud and abandons his claim for equitable relief. *Id.*

The court has consistently applied the rule in cases involving breach of warranty in sales of goods wherein the buyer renews his obligations under the sales contract with full knowledge of the defects. *See, e.g.*, Eubanks v. W.H. Hodges & Co., 254 Miss. 376, 382-84, 180 So. 2d 922, 925-26 (1965) (sale of cattle); McArthur v. Fillingame, 184 Miss. 869, 869, 186 So. 828, 829 (1939) (sale of car); Memphis Automatic Music Co. v. Chadwick, 164 Miss. 635, 639, 146 So. 137, 137 (1933) (sale of used piano); Cherokee Mills v. Conner, 164 Miss. 704, 709, 145 So. 735, 736 (1933) (sale of flour); Brewer v. Automobile Sales Co., 147 Miss. 603, 618, 111 So. 578, 580 (1927) (sale of car); J.B. Colt Co. v. Kelley, 142 Miss. 617, 621, 107 So. 757, 757 (1926) (sale of carbide light generator plant).

The instant case, of course, was a suit at law for damages. 344 So. 2d at 726. The court was, however, essentially borrowing the rule from equity. The rule has been applied at law to cut off defenses when a holder in due course sues on a note which was fraudulently procurred. This is precisely what happened in Tallahatchie Home Bank v. Aldridge, 169 Miss. 597, 153 So. 818 (1934). In that case the defendant bought stock in a corporation which had been operating in violation of the Mississippi Blue Sky laws. Notes were executed to cover the purchase price and the maker was aware of the underlying illegality. *Id.* at 600, 153 So. at 819. After several renewals, the notes were negotiated to a holder in due course, who eventually sued for the debt. *Id.* at 600-01, 153 So. at 819. The defendant attempted to assert the illegal nature of the transaction underlying the note, but the court refused to allow the defense. *Id.* at 600, 603-04, 153 So. at 819, 820. This case was cited as controlling in Gay v. First Nat'l Bank, 172 Miss. 681, 160 So. 904 (1935), which is the sole case relied upon by the court in *Waltman.* 344 So. 2d at 728.

The rule announced in *Gay* was much narrower than it had been in the earlier cases. Justice Griffith, writing for the court, quoted the holding in *Tallahatchie,* 172 Miss. at 686, 160 So. at 905, and added that where the facts and circumstances are such as to put a reasonably prudent person upon inquiry, which inquiry, if made with reasonable diligence, would have revealed the underlying fraud, then it is the duty of the maker to pursue such inquiry, and his failure to do so binds him to the contract upon renewal in the same manner as if he had actual knowledge of all the facts. *Id.* See notes 105 through 110 *infra.*

[105] 344 So. 2d at 728. Justice Lee dissented in the instant case. He maintained that Waltman did not have full knowledge of her right of action and since she had not received any substantial benefit from the renewals of the note, she should not be held to have waived her rights against the Bank. *Id.* at 729. He added that Gay v. First Nat'l Bank, 172 Miss. 681, 160 So. 904 (1935), was distinguishable on the issue of knowledge and that Waltman's knowledge and her intent to waive her rights were proper issues for the trier of fact. 344 So. 2d at 728-29. Justice Lee also pointed out that the defense of waiver asserted by the Bank had not been raised below and, pursuant to MISS. CODE ANN. § 11-7-59(4) (1972), was not now available on appeal. 344 So. 2d at 729; *accord,* Jones v. Taylor, 156 Miss. 790, 795, 126 So. 821, 822 (1930) (holding without construing statute that defense not raised at trial cannot be raised on appeal).

circumstances surrounding a transaction is sufficient knowledge to support a waiver of one's rights is inconsistent with the basic requirements for a waiver.[106]

The *Waltman* majority ignored the maker's intent[107] and failed to account for situations where the maker may have no other alternative but to renew the note.[108] A requirement that the maker of the renewal note must receive a substantial benefit[109] from the renewal[110] should be added to the Mississippi standard.

The decision in *Waltman* is particularly curious because it involved a suit for damages, not for rescission.[111] Earlier Mississippi cases recognized that renewal precludes equitable relief, but does not necessarily result in a waiver of a cause of action for damages.[112] *Waltman* appears to be inconsistent since the court seemingly has deprived the defrauded party of the right to elect his cause of action upon discovery of the fraud.[113]

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[106] 344 So. 2d at 728-29 (Lee, J., dissenting). See note 105 *supra.*

Waiver is generally defined as "the intentional or voluntary relinquishment of a known right." Black's Law Dictionary 1751 (4th ed. 1968). The necessary elements of a waiver are: (1) an intention to waive; (2) an act amounting to a surrender of a right; (3) the right relinquished must have been in existence at the time of the alleged waiver; and (4) the party waiving the right must have knowledge of the existence of such right. Bering Mfg. Co. v. W.T. Carter & Bro., 255 S.W. 243, 252 (Tex. 1923). Justice Lee, in his dissent, was primarily concerned with the elements of knowledge and intent, which he felt were lacking in the instant case, or at best were fit matter for the trier of fact. 344 So. 2d at 728-29.

[107] Many jurisdictions require actual knowledge on the part of the maker who renews a note, before a waiver of rights will be acknowledged. *See, e.g.,* Wright v. Hage, 214 Or. 400, 340 P.2d 342, 346 (1958) (involving fraud in a sales contract); Culver v. Haggard, 252 S.W. 1092, 1095 (Tex. Ct. App. 1923) (involving notes given for permit to prospect on public lands). The jurisdictions which adhere to the requirement of actual knowledge generally address the issue from the standpoint of intent. *See, e.g.,* Graham-Jones Motor Co. v. Nutter, 77 Colo. 714, 234 P. 1063, 1063 (1923) (where maker of renewal note was aware of fraud but felt he had no alternative but to renew the note, the court held that he lacked the proper intent). These courts generally hold that in order for one to be deemed to have waived a right, there must be evidence of intent to relinquish that right. Thus, if it cannot be shown that the party against whom the waiver is asserted had actual knowledge of the right or defense, the requisite element of intent is held to be lacking. Wright v. Hage, 214 Or. 400, 340 P.2d 342, 346 (1958).

Mississippi is apparently in the minority position in holding that constructive knowledge of a right is sufficient knowledge to support a waiver. *See* Gay v. First Nat'l Bank, 172 Miss. 681, 682, 160 So. 904, 905 (1935) (inquiry requirement). *See generally* 53 Harv. L. Rev. 1044 (1940).

[108] *See* Graham-Jones Motor Co. v. Nutter, 77 Colo. 72, 234 P. 1063, 1063 (1923) (purchaser of defective auto who renewed note because he felt he had no choice held not to have had requisite intent to waive his rights).

[109] United Forest Prods. Co. v. Baxter, 452 F.2d 11, 16 (8th Cir. 1971). The Eighth Circuit has required more than a mere extension of time. *Id.* at 18. See note 110 *infra.*

[110] 344 So. 2d at 729 (Lee, J., dissenting). Some courts have viewed the renewal as mutually beneficial to both parties—the maker gets additional time to pay and the holder gets live commercial paper. Scandinavian Am. Bank v. Westby, 41 N.D. 276, 172 N.W. 665, 668 (1918). On the other hand, some courts require that the maker upon renewal be substantially benefited before a waiver will result. United Forest Prod. Co. v. Baxter, 452 F.2d 11, 16 (8th Cir. 1971). The same may be true where the payee suffers no detriment or does not change his position by allowing the renewal. Scandinavian Am. Bank v. Westby, 172 N.W. at 168.

As a practical matter, *Waltman* places an undue burden on the maker of a note, especially where the maker is inexperienced and totally unaware that he may have a cause of action. The majority of jurisdictions require actual knowledge of the existence of rights on a note before renewal will preclude the maker from asserting those rights.[114] The majority view is the better rule, since the *Waltman* holding effectively allows a wrongdoer to profit from his wrongful act.

C. Sales

In the area of sales transactions, two cases rendered last year provide excellent examples of the proper construction and application of certain provisions of Article II of the Uniform Commercial Code. In one instance, the court applied the parol evidence rule as taken from the common law,[115] reaching a result consistent with its pre-Code applications of the rule. In another case concerning warranties of future performance of goods,[116] the court merely applied the pertinent Code section. By a plain reading of the statute, the court reached a result consistent with interpretations given to that section by other jurisdictions.

1. Parol Evidence Rule

In *Ralston Purina Co. v. Rooker*,[117] the supreme court applied the parol evidence rule of section 75-2-202 of the Mississippi Code[118] in a situation involving the negotiation of a contract with Ralston for the sale of a future soybean crop to be planted by Rooker. An agreement was reached whereby Rooker was to sell Ralston 4500 bushels of soybeans at $3.35 per bushel.[119] Ralston subsequently sent a written confirmation of the oral agreement to Rooker for his signature. The letter, which was signed by Rooker and returned to Ralston, provided that absent notice to the contrary the terms contained therein would be regarded as accepted.[120] Due to inclement weather, Rooker was unable to produce the specified quantity of soybeans, delivering only 609 bushels to Ralston.[121] Ralston covered and then sued Rooker for the difference in the contract price and the market price it had to pay in order to effect cover.[122] Rooker defended on two grounds: (1) the agreement made over the telephone was that Rooker was to deliver "up to" 4500 bushels to be grown on his land, and (2) force majeure intervened to prevent his performance.[123] The lower court allowed testimony regarding pertinent telephone conversations and Rooker received a favorable verdict.[124]

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[111] 344 So. 2d at 726.

[112] *See* Crabbe v. Wilkinson, 202 Miss. 274, 278-79, 32 So. 2d 356, 357 (1947) (acceptance of one-half the amount due under renewal contracts by party with knowledge of situation bars rescission); Hanson v. Field, 41 Miss. 712, 715-16 (1868) (conveyance of deed and acceptance of new note precludes equitable relief where party knew of failure to comply with original terms); Edwards v. Roberts, 15 Miss. (7 S. & M.) 544, 555 (1846) (consent to arbitration and to new note to result therefrom precludes equitable relief). The implication that a remedy at law is available does not accord with Gay v. First Nat'l Bank, 172 Miss. 181, 160 So. 934 (1935), on which the court relied in the instant case. 344 So. 2d at 728.

[113] *See* Bowman v. Webster, 44 Wash. 2d 667, 269 P.2d 960, 962 (1954) (where misrepresentations known at time vendees accepted possession of land, equitable remedies were waived). See note 112 *supra*.

[114] See note 107 *supra*.

[115] Ralston Purina Co. v. Rooker, 346 So. 2d 901, 902-03 (Miss. 1977).

[116] Rutland v. Swift Chem. Co., 351 So. 2d 324, 325-26 (Miss. 1977).

[117] 346 So. 2d 901 (Miss. 1977).

The Mississippi Supreme Court reversed and rendered on appeal, holding that where a written confirmatory memorandum, signed by the party to be charged, was intended to be a complete and final expression of the contract between the parties, parol evidence of prior inconsistent agreements is inadmissible to vary the terms of the writing.[125] The

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[118] MISS. CODE ANN. § 75-2-202 (1972). The statute provides in pertinent part:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented . . . .
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

[119] 346 So. 2d at 902.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 901.

[123] *Id.* at 902.

[124] *Id.* at 901.

[125] *Id.* at 903. The court noted specifically that where the parties are contracting without any fraud or mistake, and have "deliberately put their contract in writing, that writing is not only the best, but the only evidence of their agreement." *Id.* Consequently, to be admissible, the evidence offered by Rooker had to come within subsection (b) of MISS. CODE ANN. § 75-2-202 (1972). The court held the exception inapplicable to the instant circumstances and found that the contract did not specify that any quantity "up to" 4500 bushels was acceptable, nor did it specify the land on which the crop was to be grown. 346 So. 2d at 903. In its holding, the court placed principal reliance upon Noble v. Logan-Dees Chevrolet-Buick, Inc., 293 So. 2d 14 (Miss. 1974), *noted in* 46 MISS. L.J. 192 (1975). The *Noble* court construed MISS. CODE ANN. § 75-2-202(b) (1972) as inapplicable

Rooker court relied heavily on *Paymaster Oil Mill Co. v. Mitchell*[126] to preclude the asserted force majeure defense. The court noted that the force majeure statute[127] excuses performance only where the contract specifies the land on which the crops are to be grown.[128] The contract in *Rooker* provided only for the delivery of 4500 bushels of soybeans, making no specification of the land on which the beans were to be grown.[129] Thus, parol evidence was inadmissible to indicate a contrary intent.

The *Rooker* decision is consistent with prior decisions in this jurisdiction.[130] Although the supreme court has traditionally been reluctant to go beyond the four corners of the instrument,[131] it will, of course, do

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to an integrated contract providing for the financing arrangement in the sale of a car, despite the dealer's claim that additional funds were to come from certain insurance proceeds. 293 So. 2d at 14-15.

[126] 319 So. 2d 652 (Miss. 1975). The case involved a similar contract for the sale of soybeans. The confirmatory memorandum, however, incorporated a prior conversation by reference. That being the case, the court allowed parol evidence of the prior conversation to show that the crop was to be grown on specified acreage. *Id.* at 657. The court held that MISS. CODE ANN. § 75-2-204(b) (1972) applied and that the confirmation, without evidence of the prior conversation, was not the complete agreement. 319 So. 2d at 657. The instant case is, of course, distinguishable since the written confirmation did not reference any prior agreements. 346 So. 2d at 903. But, as in *Paymaster*, the court was merely pointing out that absent an agreement as to the specific acreage on which the crop was to be grown, intervention of force majeure does not excuse performance. *Id.* at 903. See note 127 *infra*.

[127] MISS. CODE ANN. § 75-2-617 (1972). The statute provides in part:

> Deliveries may be suspended by either party in case of Act of God, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery or apparatus, national defense requirements, or any cause beyond the control of such party, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the goods or of a material upon which the manufacture of the goods is dependent.

[128] 346 So. 2d at 903. See note 104 *supra*.

[129] 346 So. 2d at 903. The rationale underlying this holding is that the parties contracting for crops to be grown on specific acreage are usually aware of the risks involved and that the crop may fail for any number of reasons outside the parties' control. On the other hand, where no specific land is mentioned, the contract is construed as being a requirement contract to be fulfilled by the seller using whatever means available. Dunavant Enterprises, Inc. v. Ford, 244 So. 2d 788, 792 (Miss. 1974). This case was also cited by the court in the instant case. 346 So. 2d at 903.

[130] *E.g.*, Valley Mills v. Southeastern Hatcheries, Inc., 245 Miss. 71, 79, 145 So. 2d 698, 701 (1962) (where financing terms in sales contract are ambiguous, parol evidence of prior oral agreements is admissible to explain the terms); Grenada Auto Co. v. Waldrop, 188 Miss. 468, 473-74, 195 So. 491, 492 (1940) (where contract for sale of freezer was fully integrated and did not reference prior oral agreements, parol evidence of those agreements was inadmissible). See notes 125, 126 & 129 *supra*.

[131] *E.g.*, Noble v. Logan-Dees Chevrolet-Buick, Inc., 293 So. 2d 14, 15 (Miss. 1974) (the writing is not only the best, but the only, evidence of the contract); Grenada Auto Co. v. Waldrop, 188 Miss. 468, 474, 195 So. 491, 492 (1940) (negotiations and conversations leading up to a written contract are considered merged in the writing which is the com-

so when the situation demands. This is particularly true where the writing makes reference to a prior conversation between the parties[132] or where the terms of the writing are sufficiently ambiguous to allow admission of differing interpretations.[133] Otherwise, the terms of the writing and incorporation of an integration clause are taken as conclusive of the parties' intent. This reasoning comports with the construction of the statute given by the framers of the Uniform Commercial Code.[134] Parties enjoying the freedom to contract should not be allowed to escape the obligations of a writing determined to be a complete expression of their agreement.[135]

2. Warranty of Future Performance

Rutland v. Swift Chemical Co.,[136] a case of first impression in Mississippi, involved the construction of section 75-2-725 of the Mississippi Code,[137] the statute of limitations for breach of warranty.[138] On May 1, 1969, Rutland purchased fertilizer which had been stored for a long time and failed to perform as expected when finally used.[139] Rutland sued

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plete expression of the agreement). *See generally* 46 Miss. L.J. 192 (1975).

[132] Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 657-58 (Miss. 1975); Valley Mills v. Southeastern Hatcheries, Inc., 245 Miss. 71, 81-82, 145 So. 2d 698, 703 (1962).

[133] Dunavant Enterprises, Inc. v. Ford, 294 So. 2d 788, 791 (Miss. 1974); Valley Mills v. Southeastern Hatcheries of Miss., Inc., 245 Miss. 71, 79-80, 82, 145 So. 2d 698, 702-03 (1962).

[134] U.C.C. § 2-202, Comment 3 (1972 version). The reporters note that if the additional terms are such that, if agreed upon, they would normally have been reduced to writing in view of the court, then the court must keep evidence of these terms from the trier of fact. *Id.*

[135] *See* Zell v. American Seating Co., 138 F.2d 641, 643-44 (2d Cir. 1943) (comparing the advantages and disadvantages of the rule), *rev'd mem.*, 322 U.S. 709 (1944). *See generally* 46 Miss. L.J. 192 (1975). The U.C.C. provides no guidelines for determining when a writing is or is not the complete agreement of the parties. U.C.C. § 2-202 (1972 version); 1 R. Anderson, *supra* note 83, § 2-202:16, at 294-95.

[136] 351 So. 2d 324 (Miss. 1977).

[137] Miss. Code Ann. § 75-2-725 (1972) provides in pertinent part:

> (1) An action for breach of any contract for sale must be commenced within six (6) years after the cause of action has accrued.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

Id.

[138] The statute follows the U.C.C. except that it provides for a six year statute of limitations, *see* Miss. Code Ann. § 75-2-725(1) (1972), rather than the four years provided by U.C.C. § 2-725 (1972 version).

[139] 351 So. 2d at 325. There was no express warranty accompanying the fertilizer. *Id.*

Swift, the manufacturer, for breach of warranty of merchantability in June of 1975. The trial court held that the six-year statute of limitations barred the action.[140]

On appeal, Rutland argued that an implied warranty of merchantability of a product like fertilizer carried with it a warranty of future performance since the defect in the product was not discoverable until the product was used.[141] The Mississippi Supreme Court, rejecting this contention, looked to the express language of the statute and ruled that absent an explicit, clearly stated warranty of future performance, the period of limitation could not be extended beyond the statutory six-year period.[142] In short, the cause of action accrued on the date the fertilizer was bought, more than six years before the suit was filed.[143]

Since *Rutland* was the first case where the statute was applied in Mississippi, the court relied upon the construction given to similar statutes in other jurisdictions.[144] In no other jurisdiction has a contrary result been reached.[145] Thus, Mississippi is aligned with those jurisdictions which have considered the application of this section of the Uni-

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The suit was brought on breach of an implied warranty of merchantability, which is impressed upon all sales of goods in Mississippi by virtue of MISS. CODE ANN. § 75-2-314 (Supp. 1977). Such warranties cannot be disclaimed in Mississippi. *Id.* § 11-7-18.

[140] 351 So. 2d at 325.

[141] *Id.* Rutland's argument was essentially the same argument used to extend the statute of limitations covering certain torts—that the cause of action accrues when the injury is or should have been discovered. *See, e.g.,* Mayer v. Good Samaritan Hosp., 14 Ariz. App. 248, 482 P.2d 497, 499 (1971); Wilkinson v. Harrington, 104 R.I. 224, 243 A.2d 745, 753 (1968). In strict liability cases, however, U.C.C. § 2-725 (1972 version) may not have application. *See* Simmons v. Albany Boys Club, Inc., 80 Misc. 2d 19, 362 N.Y.S.2d 113, 115 (Sup. Ct. 1974) (refusing to apply contract statute of limitations to a strict liability cause of action). *See generally* J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-8 (1972); Annot., 4 A.L.R. 3d 821 (1965) (discussing choice of statutes of limitation depending upon theory of the cause of action); Annot., 37 A.L.R.2d 703 (1954) (same).

[142] 351 So. 2d at 325. The holding turned upon the court's interpretation of the word "explicit" in the statute as meaning "[s]omething expressed or clearly stated and . . . more than merely implied." *Id.*

[143] *Id.*

[144] *Id.* at 326. The court noted similar results in General Motors Corp. v. Tate, 257 Ark. 347, 516 S.W.2d 602, 605-06 (1974), and Bechmire v. Ristokrat Clay Co., 36 Ill. App. 3d 411, 343 N.E.2d 530, 532 (1976). 351 So. 2d at 326. Both of these cases reached the same result as the Mississippi court, the only difference being that the limitations period was four years in those jurisdictions, instead of the six year period applicable in Mississippi. 516 S.W.2d at 605; 343 N.E.2d at 532. Several other jurisdictions have reached the same result. *See* Everhart v. Rich's, Inc., 128 Ga. App. 319, 196 S.E.2d 475, 476 (1973) (defective draperies); Blends, Inc. v. Schottland Mills, Inc., 35 App. Div. 2d 377, 316 N.Y.S.2d 912, 914 (1970) (defective knitting yarn); Rufo v. Bastain-Blessing Co., 417 Pa. 107, 207 A.2d 823, 825-26 (1965) (defective valve on gas cylinder). No case was found in which a contrary result was reached where the action was grounded in contract. See note 118 *supra.*

[145] For cases agreeing with the court's results, see note 144 *supra.*

form Commercial Code in an interpretation coinciding with the framers' intent.[146]

D. *Secured Transactions—Attachment of Security Interest*

Section 75-9-204(1) of the Mississippi Code[147] provides in part that a security interest cannot attach unless the debtor has some rights in the collateral.[148] The court applied this section in *C.I.T. Financial Services Corp. v. First National Bank,*[149] reaching the conclusion that C.I.T. did not have a lien on a mobile home that it had financed for the dealer.[150]

C.I.T. had begun financing the dealer's purchases of mobile homes from the manufacturer during the fall of 1974.[151] Whenever a unit was shipped to the dealer, C.I.T. would receive a copy of the certificate of origin which it filed along with the financing papers in order to perfect its security interest.[152] The dealer took delivery of a unit and sold it to a buyer, who financed the purchase through First National Bank (FNB).[153] The dealer surrendered his copy of the certificate of origin to the buyer and later assigned his security instrument to FNB.[154] Several months after the sale had taken place,[155] C.I.T. paid the manufacturer for eight mobile home units and received certificates of origin for them.

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[146] See U.C.C. § 2-725, Comment (1972 version) (cause of action accrues when the breach occurs, unless warranty expressly extends to future performance).

[147] *See* Uniform Commercial Code Act, 1966 Miss. Laws ch. 316, § 9-204(1).

[148] The statute formerly stated that "a security interest cannot attach until there is agreement . . . that it attach and value is given and the debtor has rights in the collateral. It attaches as soon as all of the events in the preceding sentence have taken place unless explicit agreement postpones the time of attaching." *Id.* With adoption of the 1972 amendments to the U.C.C., the statute was changed to say, "No security interest attaches under an after-acquired property clause to consumer goods other than accessions . . . when given as additional security unless the debtor acquires rights in them within ten (10) days after the secured party gives value." Act of April 11, 1977, 1977 Miss. Laws ch. 452, § 12 (codified at Miss. Code Ann. § 75-9-204(2) (Supp. 1977)).

[149] 344 So. 2d 125 (Miss. 1977).

[150] *Id.* at 126.

[151] *Id.* at 125.

[152] *Id.* On November 15, 1974, C.I.T. paid $43,299.97 for eight units. In return, the manufacturer sent certificates of origin to C.I.T., which then filed an inventory financing statement at the chancery clerk's office covering all of the eight units. One of the units was the one involved in the current dispute. *Id.* at 125-26.

[153] *Id.* at 125. The buyer paid $1,000 down and FNB picked up the balance in the amount of $7,237.25. The dealer assigned its security instrument to FNB. These transactions took place on June 26, 1974, which was before C.I.T. had paid the manufacturer for the units and before it had received a certificate of origin from the manufacturer. *Id.*

[154] *Id.* FNB filed the financing statement at the chancery clerk's office in the county where the home was situated. *Id.*

[155] *Id.* See notes 152 & 153 *supra.*

By the time C.I.T. received the certificate of origin, the buyer had defaulted and FNB had repossessed the unit.[156] C.I.T. subsequently filed suit to replevy the unit claiming that it had a prior security interest arising from the financing arrangement with the dealer.[157] FNB had a favorable judgment from which C.I.T. appealed.[158]

The Mississippi Supreme Court affirmed the lower court's decision, holding that once the sale was made to the buyer, title passed to him and the dealer's subsequent assignment of his security instrument to FNB was a final relinquishment of any rights the dealer had in the unit.[159] Accordingly, when C.I.T. acquired the certificate of origin several months after the sale, the debtor-dealer no longer had any rights in the collateral to which C.I.T.'s interest could attach.[160]

The supreme court, construing section 75-9-204(1) of the Mississippi Code,[161] relied upon a case outside its jurisdiction in which the same result was reached under a similar statute.[162] It should be noted that the statute has since been amended[163] by the Mississippi legislature's recent adoption of the 1972 amendment to the Uniform Commercial Code.[164] The same result would have been reached, however, under the amended version of the statute.[165] Based on the interpretation of the statute by other jurisdictions,[166] the result reached here was entirely within the intended meaning of the Code and the construction given this statute by the framers.[167]

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[156] 344 So. 2d at 125. Evidently the buyer did not like the unit and quit paying for it. FNB ordered its service agent, Mobile Home Services, to repossess the unit. This was done and the unit was returned to the dealer's lot. FNB, in anticipation of reimbursement from its insurer, cancelled its filing statement. *Id.*

[157] *Id.* at 125-26. See notes 152 & 153 *supra.*

[158] 344 So. 2d at 125.

[159] *Id.* at 126-27.

[160] *Id.* The court reached this result by adopting the rule laid down in Texas State Bank v. Foremost Ins. Co., 477 S.W.2d 652 (Tex. Ct. App. 1972). The factual situation in that case was somewhat similar to the one here, and the Texas court was called upon to construe a similar provision of the Texas Uniform Commercial Code. In that case, an alleged "agent" of an insurance company procured a loan from the Texas State Bank by presenting certificates of origin to two mobile home units owned by Foremost Insurance Company. He represented that he had authority to pledge the units as collateral for the loan. *Id.* at 653. The insurance company was unaware of the "agent's" activity and in a subsequent suit, argued that the "agent" had no rights in the collateral to which a security interest could attach. *Id.* at 654. The trial court ruled in favor of the insurance company and the Texas Court of Appeals affirmed, holding that since the title certificate was in the name of the insurance company and had never been endorsed by it, the alleged "agent" had no rights in the collateral to which the security interest could attach. *Id.* at 654-55.

[161] Uniform Commercial Code Act, 1966 Miss. Laws ch. 316, § 9-204(1). See note 147 *supra.*

[162] 344 So. 2d at 126-27. See note 160 *supra.*

[163] See note 147 *supra.*

[164] Act of April 11, 1977, 1977 Miss. Laws ch. 316, § 9-204(1) (codified at MISS. CODE ANN. § 75-9-204(1) (Supp. 1977)).

[165] For the two different versions, see note 147 *supra.* Since the amended statute

III. Conclusion

While most cases merely reaffirmed certain basic principles, some decisions rendered by the 1977 Mississippi Supreme Court in the area of corporate and commercial law are disturbing. The court revealed a rather inflexible attitude in shaping the law surrounding commercial transactions. The various parties to business dealings are entitled to certainty as to their rights and liabilities, especially in the daily economic intercourse directly affecting their financial stability and bargaining power in the marketplace. The Mississippi court, in its staunch adherence to precedent, has created a gloss of certainty in corporate and commercial law. Nonetheless, many of the principles applied by the court seem not only to produce harsh and inequitable results,[168] but also seem to conflict with the practical realities of modern business trends. The mechanical approach taken by the court in dealing with corporate and commercial affairs will certainly prove a hindrance as business relations and dealings in Mississippi become more complex. It is hoped that the Mississippi Supreme Court will begin to analyze with greater sensitivity these areas of the law which so greatly affect our daily lives.

Eddie Clark Williams

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provides that the debtor must acquire rights in the collateral within 10 days after the secured party gives value, it is obvious that C.I.T. would not fare any better under the new version. Miss. Code Ann. § 75-9-204(2) (Supp. 1977).

[166] *See, e.g.,* Cain v. Country-Club Delicatessen of Saybrook, Inc., 25 Conn. Supp. 327, 203 A.2d 441, 444-45 (1964) (mere possession of items covered by after acquired property security agreement not enough to give debtor rights in the collateral for attachment of security interest). *But see* First Nat'l Bank v. Smoker, 286 N.E.2d 203, 209 (Ind. Ct. App. 1972) (when debtor acquires possession of inventory property covered by security agreement he acquires rights in the collateral sufficient to allow attachment of the creditor's interest). *See also* Evans Prod. Co. v. Jorgenson, 245 Or. 362, 421 P.2d 978, 980 (1966) (locus of title is immaterial in deciding whether debtor has acquired rights in the collateral sufficient to allow security interest to attach). The cases nevertheless support the general rule that the debtor must have some rights in the collateral before the interest of the secured party can attach. *E.g.,* Texas State Bank v. Foremost Ins. Co., 477 S.W.2d 652, 654 (Tex. Ct. App. 1972). See note 160 *supra.*

[167] U.C.C. § 9-204, Comments 2, 4 (1972 version). *See generally* 4 R. Anderson, *supra* note 83, § 9-204:7.

[168] *See, e.g.,* notes 98 through 114 and accompanying text *supra.*

CRIMINAL LAW AND EVIDENCE

In response to the "legal revolution" occurring in the area of criminal procedure[1] and the overwhelming concern for the development of evidentiary rules,[2] the Mississippi Supreme Court issued several significant opinions last year which help clarify the law in these areas. The court, sensitive to recent United States Supreme Court decisions concerning capital punishment, considered the complexities surrounding application of the ultimate criminal sanction. In addition to less controversial decisions involving procedural safeguards afforded criminal suspects, the court adopted the prior identification exception to the hearsay rule and fashioned a rule concerning the admissibility of search warrants with attached affidavits. Furthermore, the court's interpretation of the state's marital privilege statute compelled important and prompt legislative action.

Many of the decisions rendered in 1977 generated sufficient interest to warrant commentary. The following discussion is designed to reveal and analyze the decisions most significantly affecting the law of criminal procedure and rules of evidence in Mississippi.

I. Criminal Law and Procedure

A. *Capital Punishment*

In 1977, there were two significant judicial decisions concerning capital punishment in Mississippi. In *Gray v. State,*[3] the Mississippi Supreme Court considered for the first time a death penalty case tried under the bifurcated trial procedure mandated in 1976 by *Jackson v. State.*[4] In *Upshaw v. State,*[5] the court determined that imposition of the death penalty for rape of a female child under the age of twelve years is constitutional.[6] These cases reflect the recent attempts by the United States Supreme Court to discern the constitutional limits[7] of capital punishment. A brief exposition of the latest Supreme Court decisions concerning the death penalty is necessary to place the Mississippi cases in a proper context.

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[1] Israel & LaFave, Criminal Procedure—Constitutional Limitations 1 (2d ed. 1975).

[2] *See, e.g., Symposium on Mississippi Evidence—Part 1,* 48 Miss. L.J. 899 (1977); *Symposium on Mississippi Evidence—Part II,* 49 Miss. L.J. 1 (1978).

[3] 351 So.2d 1342 (Miss. 1977).

[4] 337 So.2d 1242 (Miss. 1976). In *Jackson,* the court adopted the guidelines set out in Gregg v. Georgia, 428 U.S. 153, 188-95 (1976), in which the Supreme Court approved the bifurcated trial system as a constitutional procedure for imposing the death penalty. 337 So.2d at 1251-56.

[5] 350 So.2d 1358 (Miss. 1977).

[6] *Id.* at 1360-61.

[7] The Supreme Court's current standard of review in capital punishment cases is analyzed in Comment, *Capital Punishment: Constitutional Parameters for the Ultimate Penalty,* 11 U. Rich. L. Rev. 101 (1976).

In 1972, the Supreme Court, in *Furman v. Georgia,*[8] forbade imposition of the death penalty in instances where the judge or jury was granted unfettered discretion.[9] The "arbitrary and capricious" manner in which the death penalty was administered under discretionary statutes was deemed unconstitutional.[10]

To eliminate the broad discretion condemned in *Furman,* many states, including Mississippi,[11] enacted mandatory death penalty statutes. Other states, including Georgia, Florida, and Texas, devised more complex statutes[12] designed to give the sentencing authority all relevant information concerning both the nature of the crime and character of the offender. These statutes sought to limit the discretion of the judge and jury by providing the court with objective criteria for determining the circumstances requiring the death penalty.[13]

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[8] 408 U.S. 238 (1972). The Court held that the imposition of the death penalty in these cases constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments. *Id.* at 239-40. Also heard with *Furman* were Jackson v. Georgia (No. 69-5030) and Branch v. Texas (No. 69-5031), both rape cases. For a discussion of the uncertainty created by *Furman's* split decision, see *The Supreme Court, 1971 Term,* 86 HARV. L. REV. 1, 76-95 (1972).

[9] 408 U.S. at 239-40. Georgia law, under which petitioner Furman was sentenced, allowed the jury to choose between death and life imprisonment. *See* GA. CODE ANN. § 26-1005 (Supp. 1971). For petitioner Jackson, sentenced to death for forcible rape, the jury could have chosen the death penalty, life imprisonment or imprisonment on a labor farm for one to twenty years. *Id.* § 26-1302. Petitioner Branch, also convicted of rape, was susceptible to similar punishment at the jury's discretion. TEX. PENAL CODE art. 1189. Furman v. Georgia, 408 U.S. 238, 308 n.89 (1972).

[10] 408 U.S. at 239-40. At issue was the violation of the eighth amendment, which provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. Justice Douglas was concerned with the discriminatory operation of the discretionary statute. 408 U.S. at 256. Justice Stewart argued that because the death sentence was so infrequently imposed, its imposition was both cruel and unusual. *Id.* at 309. Both Justice Stewart and Justice White asserted that since the infrequent administration of the death penalty serves no legislative purpose and there are no social ends to justify its imposition, the penalty constitutes cruel and unusual punishment. *Id.* at 309, 312. *See generally* Note, *Discretion and the Constitutionality of the New Death Penalty Statute,* 87 HARV. L. REV. 1690, 1693 (1974).

[11] Act of April 23, 1974, 1974 Miss. Laws ch. 576, §§ 2(1), 7, 8(1). Before the laws on capital punishment could be legislatively treated, the Mississippi Supreme Court responded to *Furman* by ruling invalid the part of MISS. CODE ANN. § 97-3-21 (1972), which allowed the imposition of the death penalty. *See* Capler v. State, 268 So.2d 338, 339-40 (Miss. 1972) (murder conviction). After the statutory revision of 1974, the court held that the mandatory imposition of death was constitutional. *See* Stevenson v. State, 325 So.2d 113, 116 (1975) (murder conviction). The *Furman* issue was limited only to sentencing, and the court concluded that the discretion inherent in plea bargaining, prosecutorial discretion, appellate review, and executive clemency does not render the capital murder law unconstitutional. *Id.* at 115-16. The court ruled that the request for an instruction on lesser included offenses was properly refused, since it would have infused an element of discretion. "The jury has the option either to convict or to acquit the defendant and nothing more." *Id.* at 116.

[12] For a discussion of post-*Furman* legislative response, see Note. *supra* note 10, at 1699-1712.

Four years after its enactment, the Georgia death penalty statute[14] was challenged in *Gregg v. Georgia*[15] as unconstitutional under the *Furman* standard. The United States Supreme Court, however, approved the bifurcated trial procedure[16] adopted by Georgia. Stating that some discretion always exists, the *Gregg* Court reasoned that *Furman* required only that discretion be limited to prevent administration of the death penalty in an arbitrary and capricious manner.[17] This requirement was satisfied by Georgia's system of requiring the sentencing authority to consider mitigating circumstances and to apply the death penalty only when specific guidelines were met.[18]

In the same year, a mandatory death penalty statute was struck down as unconstitutional by the Supreme Court in *Woodson v. North Carolina*.[19] This type of automatic death sentence was deemed inconsistent with evolving standards of society[20] and the directives of

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[13] *Id.* at 1712-19.

[14] GA. CODE ANN. § 27-2534.1 (Supp. 1975). The Georgia statutes provided for a separate determination of guilt and punishment, a finding of aggravating circumstances before imposition of death, and appellate review of any death sentence. *Id. See generally* Comment, *Furman v. Georgia and Georgia's Statutory Response,* 24 MERCER L. REV. 891 (1973).

[15] 428 U.S. 153 (1976). *Gregg,* a murder case, was decided the same day as four other capital murder cases. *See* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Profitt v. Florida, 428 U.S. 242 (1976). *See generally The Supreme Court, 1975 Term,* 90 HARV. L. REV. 58, 63 (1976). The first issue addressed in *Gregg* was whether the death penalty is unconstitutional per se. Resolving the question, the Court held that "the punishment of death does not invariably violate the Constitution." 428 U.S. at 169. *See generally* Comment, *Death Penalty Statutes: A Post-Gregg v. Georgia Survey and Discussion of Eighth Amendment Safeguards,* 16 WASHBURN L. J. 497 (1976).

The Court expressly reserved the question of whether capital punishment could be imposed "where no victim was deprived of life." 428 U.S. at 187. The issue was dealt with in Coker v. Georgia, 433 U.S. 584 (1977), where the death penalty for a rape in which no life was taken was ruled unconstitutional. *Id.* at 598. *See generally* Comment, *Gregg v. Georgia: The Search for the Civilized Standard,* 1976 DET. C. L. REV. 644, 666.

[16] The Supreme Court approved similar procedures in Jurek v. Texas, 428 U.S. 262, 276 (1976) and Profitt v. Florida, 428 U.S. 242, 260 (1976).

[17] 428 U.S. at 189.

[18] *Id.* at 206, 207.

[19] 428 U.S. 280, 293, 303-04 (1976); *accord,* Roberts v. Louisiana, 428 U.S. 325, 336 (1976).

[20] 428 U.S. at 293. The Supreme Court uses the performance of juries and legislatures as bases of support for the proposition that society no longer sanctions mandatory death sentences. It has been shown that under mandatory death statutes jurors have refused to

Furman.[21] *Woodson* effectively invalidated Mississippi's mandatory death penalty statute,[22] while *Gregg* provided new guidance in the capital punishment area.

The impact of *Gregg* and its companion cases was first realized in Mississippi in *Jackson v. State.*[23] In *Jackson,* the Mississippi Supreme Court accommodated *Woodson* by construing the mandatory language in the capital murder statute to be permissive rather than mandatory.[24] Thus, the death penalty could be applied, if warranted, after a trial governed by the procedure approved in *Gregg.*[25] The Mississippi court directed that a bifurcated trial would be used in all future capital cases.[26] At the first stage of the trial only the guilt or innocence of the

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convict "palpably guilty men," and where discretionary statutes were in existence jurors were loath to impose the death penalty. *Id.* Legislatures, with one exception, had abandoned mandatory death statutes in favor of discretionary statutes prior to *Furman. Id.* at 295. *See generally* Note, *supra* note 10.

[21] 428 U.S. at 303-04. *Furman* had been misinterpreted to mean that no discretion in the sentencing authority would be allowed in capital cases. The North Carolina statute provided neither standards nor relevant information by which the jury could make an objective determination of whether death was warranted. There was, consequently, no standard for judicial review. By applying the death penalty to categories of crime, the statutes failed to differentiate the offenders with their individual characteristics as required by the eighth amendment. *Id.*

[22] MISS. CODE ANN. §§ 97-3-19(2), -65(1), -25-55(1) (Supp. 1974) (specific classes of murder, rape, and air piracy).

[23] 337 So. 2d 1242 (1976). *Jackson* offers an excellent analysis of *Gregg. Id.* at 1248-56.

[24] *Id.* at 1251. The court found the dominant intent of the Mississippi legislature was to enact a constitutional death penalty statute. Coupling this intent with language in MISS. CODE ANN. § 93-3-21 (1972), which is susceptible to a constitutional construction, the court ruled that the constitutional interpretation must be applied. 337 So.2d at 1251. MISS. CODE ANN. § 97-3-21(2) (Supp. 1974) provides in pertinent part, "Every person who shall be convicted of capital murder shall be sentenced by the Court to death." *Id.* Relying on State v. County School, 181 Miss. 818, 181 So. 313 (1938), the court stated the word "shall" may be construed as permissive rather than mandatory. 337 So.2d at 1251.

[25] 337 So.2d at 1251.

[26] *Id.* at 1256. In its conclusion to *Jackson,* the court described the essential characteristics of the new procedure as follows:

(1) A trial confined to the issue of guilt and conducted in the usual manner, except as to sentencing, will constitute the first phase of the bifurcated procedure.

(2) If the first phase results in a verdict of guilty, the second phase will consist of a trial, before the same jury if possible, on the issue of sentencing either to death or to life imprisonment.

(3) The state may rest on its case already established or it may reintroduce evidence relevant to sentencing and introduce new evidence of prior convictions to show aggravating circumstances. Conversely, the defendant may prove mitigating circumstances by establishing the absence of prior convictions and the presence of other factors regarding his "life and character" or his crime relevant to his sentence.

(4) The mitigating factors must outweigh the aggravating factors to allow the sentence of life imprisonment where the capital offense has been established.

defendant would be determined.[27] In the sentencing phase, all pertinent information would be considered by the jury in making a balanced judgment concerning the penalty to be imposed.[28] The jury's decision would then be subject to preferential appellate review by the Mississippi Supreme Court to ensure that the death penalty was not inflicted in an arbitrary and capricious manner.[29]

Decided last year, *Gray v. State*[30] was the first case[31] utilizing the *Jackson* procedure. The defendant in *Gray* was convicted of capital murder and sentenced to death in accordance with *Jackson.*[32] Finding errors in both the guilt-finding and the sentence-determining stages, the court reversed and remanded the case for a new trial.[33] Through *Gray,* the court sought to define further the procedure set out in *Jackson* and subsequently incorporated in the statutes[34] of Mississippi.

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(5) To order the death penalty, the jury must return a special verdict finding that the aggravating factors outweigh the mitigating factors. For a life sentence, no special finding is required.

(6) Where the jury cannot agree, the sentence shall be life imprisonment.

(7) Death penalty convictions will receive preferential review to determine that the sentence is warranted and has not been applied arbitrarily or inconsistently. *Id.*

[27] *Id.*

[28] *Id.* Under this system information that may be highly prejudicial and irrelevant to the question of guilt would be admitted only at the second stage, where it could be important in determining the sentence. *Id.* at 1252.

[29] *Id.* at 1255-56.

[30] 351 So.2d 1342 (Miss. 1977).

[31] There were several other capital cases heard on appeal in 1977 that had been tried under pre-*Jackson* law. Those defendants had been convicted under statutes carrying mandatory death sentences. The following cases, all capital murder cases except one, Upshaw v. State, 350 So.2d 1358 (Miss. 1977) (capital rape), were reversed and remanded for new trials compatible with the bifurcated scheme set out in *Jackson. See* Upshaw v. State, 350 So.2d 1358, 1361 (Miss. 1977); Davis v. State, 349 So.2d 509, 510 (Miss. 1977); Spencer v. State, 348 So.2d 1030, 1030 (Miss. 1977); Culberson v. State, 348 So. 2d 1025, 1025 (Miss. 1977); Caldwell v. State, 347 So.2d 1389, 1391 (Miss. 1977); Pickle v. State, 345 So.2d 623, 624 (Miss. 1977); Moore v. State, 344 So.2d 731, 736 (Miss. 1977); Henderson v. State, 342 So.2d 744 (Miss. 1977); Jones v. State, 342 So.2d 735, 735 (Miss. 1977); Ivey v. State, 341 So.2d 918, 918 (Miss. 1977).

[32] 351 So.2d at 1344. The defendant was found to have kidnapped and killed a young girl. He was convicted under MISS. CODE ANN. § 97-3-19 (Supp. 1977) which provides in part:

> (1) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> . . . .
>
> (e) When done with or without any design to effect death by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies.

Id.

[33] 351 So.2d at 1345, 1346.

[34] Act of April 13, 1977, 1977 Miss. Laws ch. 458, §§ 2-5. House Bill No. 299 was

Jackson made little change in the trial procedure for determining guilt or innocence.[35] The errors in the trial stage of *Gray,* being general in nature, were deemed reversible upon established principles rather than upon the basis of *Jackson.* Two of the errors concerned evidentiary matters. First, the state was allowed to show that the defendant was on parole, thereby indirectly indicating a prior conviction,[36] and second, an officer's testimony was not confined to the issue of guilt, but tended to encourage the jury to prejudicial inferences.[37] The third error involved the denial of the defendant's constitutional right to argue his case to the jury.[38]

The *Jackson* court declared that section 99-17-20 of the Mississippi Code, which prohibited the granting of instructions as to lesser included offenses, is no longer binding.[39] This ruling permitted the granting of such an instruction on behalf of the defendant in *Gray.* Granting this instruction, the court argued, advances the efficient administration of justice and leaves the jury with an option where a decision cannot be reached with regard to a capital offense.[40] The court in *Gray* advised the

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enacted to codify the reforms, as presented in *Jackson,* of Mississippi laws dealing with the death penalty. The changes effected in the statutes are summarized in the introduction to the Bill which reads:

> An Act to amend Section 97-3-21, Mississippi Code of 1972, to require life imprisonment or death or punishment for capital murder cases; to require a separate sentencing procedure; to set forth guidelines for the sentencing procedure; to require judicial review of the death sentence; to amend Section 1-3-4 [definition of capital case], 97-3-65 [rape of female under 12 years], 97-7-67 [treason], 97-25-55 [air piracy], Mississippi Code of 1972, to allow the judge in cases punishable by death to instruct the jury as to their discretion to convict for an offense not set for the indictment; to amend Section 9-3-21, Mississippi Code of 1972, to change the time for hearing death penalty cases in the Supreme Court; and for related purposes.

[35] 337 So.2d at 1256. "The first phase of the trial relating to guilt or innocence shall be conducted in all respects in the same manner that other criminal trials are now conducted." *Id.*

[36] 351 So.2d at 1345. Evidence of the prior conviction would be admissible in the second stage. 337 So.2d at 1256; MISS. CODE ANN. § 97-3-21 (5)(b) (Supp. 1977). The statute allows admission of convictions "of another capital offense or of a felony involving the use or threat of violence to the person." *Id.* It is more restrictive than *Jackson,* which allowed any criminal conviction to be entered. 337 So.2d at 1256. See note 23 *supra.*

[37] 351 So.2d at 1345-46.

[38] *Id.* at 1345. The right to argue one's own case in criminal matters is guaranteed by MISS. CONST. art. III, § 26.

[39] 337 So.2d at 1255. MISS. CODE ANN. § 99-17-20 (Supp. 1977) allows the granting of an instruction of lesser included offenses. The issuance of such an instruction, however, lies in the discretion of the judge and is to be given only when warranted by the evidence. 337 So.2d at 1255.

[40] 337 So.2d at 1255. The petitioner in *Gregg* argued that to submit an instruction for lesser included offenses to the jury violated the discretionary standards of *Furman.* The

district attorney and the judge that they should not comment either in argument or in rulings in a manner tending to negate the effect of the defendant's lesser included offense instruction.[41]

Because the lower courts lacked experience with the procedure in the sentence-determining phase, the *Gray* court offered guidance in this area. The court held it was error to compel the defendant to go forward with proof of mitigating circumstances before the state had attempted to make its case. Having the burden of proving both guilt and aggravating circumstances, the state must precede the defense.[42] It was also deemed error to limit the content and restrict the time of the defendant's argument in the punishment stage.[43] The *Gray* court added, however, that errors in this phase will result in reversal of the sentencing stage only.[44]

Directing the courts to try capital cases in accordance with House Bill No. 299,[45] *Gray* referred specifically to the form of verdict to be used by juries in the punishment stage. In effect, the Act requires a special verdict with the jury listing the statutory aggravating and mitigating circumstances.[46] Notwithstanding that the special verdict must list the statutory mitigating circumstances, the defense, in view of the gravity of the outcome, must still have full range within "the legitimate field of . . . argument" to develop any mitigating factors.[47] The 1977 Act governs all cases tried after April 13, 1977, the effective date of the Bill.[48]

The procedural aspects of capital punishment were not, however, the only significant criminal law matters dealt with by the Mississippi Supreme Court in 1977. *Upshaw v. State*[49] involved consideration of the constitutionality of the death penalty for the rape of a female child under the age of twelve years.[50] The Mississippi court deferred hearing

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Supreme Court said "nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." 428 U.S. at 199.

[41] 351 So.2d at 1347.

[42] *Id.* at 1346.

[43] *Id.* The defendant's argument was restricted to twelve minutes. Noting this error, the court stated that where the defendant's life is in the balance, limitations are "clearly an abuse of discretion." *Id.*

[44] *Id.*

[45] *Id.* at 1349. See note 34 *supra.*

[46] MISS. CODE ANN. § 99-19-101 (Supp. 1977). This statute includes not only the list of aggravating and mitigating circumstances, but the entire substantive procedure for the sentence-determining phase as well. *Id.* The advantages of this form of verdict are that it focuses the jury's consideration, helps the jurors weigh the relevant factors, and assists the appellate courts in determining whether the sentence is just.

[47] 351 So.2d at 1346 (quoting Nelms & Blum Co. v. Fink, 159 Miss. 372, 382-83, 131 So. 817, 820-21 (1930)).

[48] *Id.* at 1349.

[49] 350 So.2d 1358 (Miss. 1977).

[50] MISS. CODE ANN. § 97-3-65 (Supp. 1977). This statute permits a sentence of death

the case[51] until the United States Supreme Court decided *Coker v. Georgia*,[52] which involved the constitutionality of the death penalty for the rape of an adult woman. The United States Supreme Court ruled that, for the crime of rape, the death penalty is unconstitutional as grossly disproportionate and excessive punishment.[53] Looking first to objective criteria, the *Coker* Court decided that the death penalty for the crime of rape violated the eighth amendment. Legislative rejection of the sentence[54] and the reluctance of juries to impose death on those guilty of rape[55] were considered in determining that society found capital punishment inappropriate in rape cases.[56] The Supreme Court espoused the view that rape, though a serious crime, does not compare with murder "in terms of moral depravity and of the injury to the person and the public."[57] It is, therefore, the taking of life that distinguishes the crimes

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for "[e]very person eighteen (18) years of age or older who shall be convicted of rape by carnally and unlawfully knowing a female child under the age of twelve years." *Id.*

[51] 350 So.2d at 1360.

[52] 433 U.S. 623 (1977). The Supreme Court had expressly reserved this question in *Gregg,* where the issue decided was narrowed to whether the death penalty was constitutional for deliberate murder. 428 U.S. at 187. See note 11 *supra.*

[53] 433 U.S. at 598. The Court referred to two tests expressed in *Gregg,* 428 U.S. at 173: Punishment must make "a measurable contribution to acceptable goals of punishment [but must not be] out of proportion to the severity of the crime." 433 U.S. at 592. Admitting that the death penalty may serve legitimate ends in rape cases, the *Coker* Court held that it failed the test of proportionality. *Id.* at 599. *See generally* Comment, *Gregg v. Georgia: The Search for the Civilized Standard,* 1976 DET. C. L. REV. 645, 660.

[54] When *Coker* was decided, no other state authorized the death penalty for rape of an adult. 433 U.S. at 595-96. Two states used the penalty for rape of a female of twelve years of age or less. FLA. STAT. ANN. § 794.011(2) (1976); MISS. CODE ANN. § 97-3-65(1) (Supp. 1977). In two pre-*Coker* cases involving rape victims under twelve years old, the Florida Supreme Court reduced the sentences to life imprisonment without reaching the question of the death penalty's constitutionality. Huckaby v. State, 343 So.2d 29, 33-34 (Fla.), *cert. denied,* 98 S.Ct. 393 (1977); Purdy v. State, 343 So.2d 4, 6 (Fla.), *cert. denied,* 98 S.Ct. 153 (1977).

[55] Since 1973, juries in Georgia have imposed the death sentence on the average in only one out of ten cases of rape. 433 U.S. at 597.

[56] *Id.* at 593-96. An interesting study of the legislative history of Georgia's statutes on rape suggest the institution of the death penalty for this crime was motivated by race alone, that is, to provide for instances where black males raped white females. After noting the infrequent and inconsistent application of the death penalty in rape cases and society's repudiation in general of capital punishment for rape, the author concludes, much like the Supreme Court, that the death penalty is inappropriate for rape. White, *Disproportionality and the Death Penalty: Death as a Punishment for Rape,* 38 U. PITT. L. REV. 145, 166-84 (1976).

[57] 433 U.S. at 598. The Court stated:

> Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it

of murder and rape and the punishments proportionate to each.[58]

In *Upshaw,* however, the Mississippi Supreme Court held the death penalty constitutional for the rape of a female under twelve years of age.[59] Distinguishing *Coker* as limited to the rape of an adult woman,[60] the *Upshaw* court stated that it is the legislature's function to define crimes and to decide whether the death penalty is appropriate for the crimes.[61] The court reversed and remanded the case under the *Jackson* logic for retrial according to House Bill No. 299.[62]

The Mississippi court's narrow, though plausible, reading of *Coker* restricts the United States Supreme Court decision to adult women. While tacitly acknowledging that the rape of a child is more consequential than the rape of an adult woman,[63] the reasoning of the United States Supreme Court should clearly be applied to the rape of a child also.[64] The crux of the *Coker* opinion turns on the taking of life.[65] This qualitative difference in the nature of the crimes of murder and rape should be reflected in the punishment. Therefore, the *Coker* determination that capital punishment is excessive for a rapist who has not taken a life, leaves the *Upshaw* court's interpretation open to question.

B. Bail

In the 1977 case of *Wood v. State,*[66] the Mississippi Supreme Court extended a provision of the Professional Bail Bond Act[67] to nonprofes-

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> is not over and normally is not beyond repair.

Id.

[58] *Id.*

[59] 350 So.2d at 1361.

[60] *Id.* at 1360. The court referred to the specific issue stated in *Coker*. "That question, with respect to rape of an adult woman is now before us." 433 U.S. at 592. The opinion in *Coker* used "adult woman" frequently because the victim of the rape in question was an adult. The *Coker* Court's interchangeable use of the term "rape" and "rape of an adult woman" did little to delineate the scope of the decision. *See id. passim.*

[61] 350 So.2d at 1360. The court relied upon Chief Justice Burger's dissent in *Coker* for the proposition that the court must concern itself with the constitutional limits on the legislature's powers, rather than its own preference for how those powers should be used. *Id.*

[62] *Id.* at 1361.

[63] 433 U.S. at 592.

[64] *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 70, 123 n.4 (1977). See notes 53 through 58 and accompanying text *supra.*

[65] 433 U.S. at 598.

[66] 345 So.2d 616 (Miss. 1977).

[67] MISS. CODE ANN. § 83-39-7 (1972). The statute provides in part:

> A bail bondsman licensed under this chapter shall have a right to apply for and obtain from the proper court an extension of time delaying a final judgment of forfeiture if such bail bondsman can satisfactorily establish to the court wherein

sional sureties. This case involved a motion by a principal and his sureties to hold bond forfeiture in abeyance because the principal was in lawful custody in another jurisdiction and was, therefore, unable to appear.[68] In prior decisions, the Mississippi court had stated that a surety is not relieved and bond shall be forfeited if the principal voluntarily leaves the state and subjects himself to the jurisdiction of another state.[69] In *Wood,* however, the court held that since in this situation the Professional Bail Bond Act would allow professional bondsmen an extension of time before forfeiture, it would be unfair not to extend the same time to nonprofessional sureties.[70] This case specifically overruled three prior Mississippi decisions requiring bond forfeiture even though the principal was in another jurisdiction.[71] Prior to this ruling, a surety could be exonerated in Mississippi only if his performance was rendered impossible by an act of God, an act of the obligee or an act of law.[72] Under such a standard, incarceration in another jurisdiction was not considered an act of law, but rather a voluntary act of the principal.[73]

Wood seems equitable because it provides for equal treatment of all sureties.[74] Also, the decision does not prejudice the state's interests, since the statute provides safeguards[75] to ensure that the principal is

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> such forfeiture is pending that the defendant named in such bail bond is lawfully in custody outside the State of Mississippi.

Id.

[68] 345 So.2d at 616.

[69] Nix v. State, 213 So.2d 554, 559 (Miss. 1968); Phillips v. State, 185 So.2d 157, 160 (Miss. 1966); Corn v. State, 250 Miss. 725, 729, 168 So.2d 304, 306 (1964). In *Corn* the court said, "The incarceration of the principal in a different jurisdiction for a second and different offense against the laws of that jurisdiction even where the principal is prevented from appearing to answer his bail by such incarceration, does not exonerate the surety." *Id.* The view in *Corn* appears to be the majority view in this area. The Florida Court of Appeal has looked rather deeply into this area and has held that it is no reasonable excuse for nonappearance that a principal has left the jurisdiction and subjected himself to the laws of another jurisdiction, and bond should therefore be forfeited. Public Serv. Mut. Ins. Co. v. State, 135 So.2d 777, 779-85 (Fla. Dist. Ct. App. 1961); *accord,* Swift v. Esdale, 293 Ala. 525, 306 So.2d 268, 272-73 (1975); Corbin v. Superior Court, 2 Ariz. App. 262, 407 P.2d 943, 945-46 (1965); People v. McCracken, 11 Mich. App. 553, 161 N.W.2d 758, 759 (1968); State v. Bonding Ins. Co., 81 N.M. 154, 464 P.2d 884, 887-89 (1970); Resolute Ins. Co. v. State, 479 P.2d 956, 956-57 (Okla. 1971); Umatilla County v. Resolute Ins. Co., 8 Or. App. 318, 493 P.2d 731, 732-33 (1972). *But see* Public Serv. Mut. Ins. Co. v. State, 140 So.2d 66, 68-69 (Fla. Dist. Ct. App. 1962) (sureties exonerated where the principal was arrested, convicted, and incarcerated by a federal court within the jurisdiction).

[70] 345 So.2d at 617-18.

[71] *Id.*

[72] Corn v. State, 250 Miss. 725, 729, 168 So.2d 304, 306 (1964).

[73] *Id.*

[74] Instead of following its prior case law, the court here is dealing with and expanding legislative action to apply equitably to all types of sureties involved.

[75] Under the statute the bondsman will be required to show that a "hold order" has

returned to the state upon completion of his incarceration in the other jurisdiction.

II. EVIDENCE

A. *Marital Evidence in Child Abuse Cases*

The most interesting case rendered in the area of evidence last year involved the interpretation of section 13-1-5[76] of the Mississippi Code, dealing with privileged communications between husband and wife. In *Tapp v. State*,[77] the supreme court held that it was reversible error to compel the wife to testify against her husband at his trial for the manslaughter of her child.[78]

In 1976 the Mississippi Supreme Court construed section 13-1-5 in *Merritt v. State*.[79] In that case, a divided court[80] held that a wife could testify against her husband in a child abuse case because child abuse, under this section, was an exception to the rule of marital privilege.[81] In *Merritt*, the defendant was convicted of murdering his two year old daughter to collect on an insurance policy he had taken out on her life.[82] In this well-reasoned opinion, the court announced that the husband-

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been placed on the defendant for return to the State of Mississippi upon release from the other jurisdiction. Also, if the defendant is not returned forfeiture will be made final. MISS. CODE ANN. § 83-39-7 (1972).

[76] MISS. CODE ANN. § 13-1-5 (1972). This version of the statute provided:

> Husbands and wives may be introduced by each other as witnesses in all cases civil or criminal, and shall be competent witnesses in their own behalf, as against each other, in all controversies between them. A criminal prosecution of either husband or wife for contributing to the neglect or delinquency of a child or desertion or nonsupport of children under the age of sixteen (16) years or abandonment of children shall be deemed controversies between husband and wife for the purpose of this section. But in all other instances where either of them is a party litigant the other shall not be required to answer interrogatories or to make discovery of any matters involved in any such other instances without consent of both.

Id.

[77] 347 So.2d 974 (Miss. 1977).

[78] *Id.* at 977. The appellant was convicted of the manslaughter of his wife's two and one-half year old son. The evidence showed that the child died as a result of the abuse inflicted on it by the appellant. *Id.* at 976. This case also involved the questions of substituting one doctor for another to give expert testimony when the scheduled witness became unavailable and admitting into evidence pictures of the deceased child. The court dismissed these questions cursorily as without merit. *Id.* at 977.

[79] 339 So.2d 1366 (Miss. 1976).

[80] This case was affirmed on a four-four split of the court. Chief Justice Gillespie, and Justices Robertson, Sugg, and Walker voted to affirm, while Justices Patterson, Inzer, Lee and Smith dissented. Justice Broom took no part. *Id.* at 1371.

[81] *Id.* at 1370.

[82] *Id.* at 1367, 1371.

wife privilege was destroyed because an act of violence against a child is in essence an act of violence against the wife, a circumstance that destroyed the privilege at common law.[83] In the alternative, the *Merritt* court stated that this act could be considered an extreme form of neglect that would not be privileged under the statute.[84] Chief Justice Gillespie, writing for the *Merritt* majority, relied on several cases from Mississippi[85] and other jurisdictions[86] in recognizing this view as representative of the modern trend.[87] Justice Lee, on the other hand, stated in dissent that the court's interpretation was improper and the testimony should have been excluded because the situation did not fall within the literal wording of the statute.[88]

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[83] *Id.* at 1369. The court discussed the common law exception that a wife may testify against her husband for a crime of personal violence against her, looking to Turner v. State, 60 Miss. 351, 354 (1882), in which the Mississippi court adopted this exception. The court also adopted the reasoning in a Missouri case, State v. Kollenborn, 304 S.W. 2d 855, 861-63 (Mo. 1957), holding that an act of violence against a child is in essence an act of violence against the marital status and therefore the privilege does not attach. *Id.* at 864. Another case the Mississippi court discussed in its opinion was Chamberlain v. State, 348 P.2d 280, 284-85 (Wyo. 1960), in which the Wyoming court held that the statutory rape by a father of his daughter constituted a crime against his wife and the wife was therefore competent to testify against her husband. *Id.* at 289.

[84] 339 So.2d at 1369. On this point the court considered Graham v. State, 250 Miss. 816, 819, 168 So.2d 496, 497 (1964), in which the court held that a wife could testify against her husband when he was charged with incest with their minor daughter. In holding that this crime constituted a conflict between husband and wife under the statute, the court said that it was a form of contributing to the delinquency of a child. *Id.* The court also considered a Montana case, State v. Taylor, 163 Mont. 106, 515 P.2d 695, 702-03 (1973), in which the Montana court, construing a statute similar to the Mississippi statute in question, held that the murder of a child constituted neglect within the meaning of the statute. The court specifically stated that " 'neglect' includes any abuse of children whether inflicted negligently or intentionally." 515 P.2d at 703.

[85] *See* Graham v. State, 250 Miss. 816, 819, 168 So.2d 496, 497 (1964) (wife competent to testify against husband on charge of incest with his minor daughter on grounds that it constituted contributing to the delinquency of the child); Turner v. State, 60 Miss. 351, 354 (1882) (wife is competent to testify against her husband for a crime of personal violence against her).

[86] *See* State v. Kollenborn, 304 S.W. 2d 855, 861-63 (Mo. 1957) (act of violence against a child constitutes act of violence against family relationship and privilege does not apply); State v. Taylor, 163 Mont. 106, 515 P.2d 695, 703 (1973) (murder of a child constituted neglect within the meaning of the statute); Chamberlain v. State, 348 P.2d 280, 284-85 (Wyo. 1960) (statutory rape by a father of his daughter constituted a crime against the wife and the marital privilege did not apply).

[87] 339 So.2d at 1369. In speaking of the common law exception to the privilege for acts of violence against the wife, the court stated that "[t]he modern trend has been to expand this common law exception to include violent acts committed on the children." *Id.* The court further reasoned that "[w]hen a father murders his child, how can it possibly be said that the prohibition of the wife's testimony will promote domestic harmony or peace of society? Indeed, the family has been destroyed and society in general would suffer if the wife's testimony was withheld from the court." *Id.*

Last year, the Mississippi court shifted away from *Merritt,* holding that the privilege should apply where the wife does not testify voluntarily.[89] In *Tapp v. State,*[90] the defendant was convicted of the manslaughter of his wife's two and one-half year old child by a former marriage.[91] The evidence showed that the child had died of injuries to his small intestine caused by the defendant's abuse of the child.[92] On the day after the child's death, Mrs. Tapp separated from her husband and filed an affidavit against him for child abuse. Approximately one month before trial, the defendant and his wife began living together again.[93] When the matter finally came to trial, Mrs. Tapp did not wish to testify, but was compelled to do so. Her testimony was admitted over the defendant's objection, and he appealed on the ground that admission of her testimony was reversible error.[94] Justice Lee, writing for the majority, stated that a wife could not be compelled to testify against her husband in a child abuse case.[95] Distinguishing *Merritt* solely on the basis of the volition of the witness,[96] the court noted that in *Merritt* the wife testified voluntarily, while in *Tapp* the wife did not wish to testify.[97]

Justice Gillespie disagreed with the majority, stating that the *Tapp* opinion is out of harmony with *Merritt's* holding that a prosecution for a crime against a child is a controversy between husband and wife within the meaning of our statute.[98] The dissenting justice also expressed concern that the distinction between voluntary and involuntary testimony would lead to intimidation of the innocent spouse by the abusive spouse, thereby compounding the criminal activity already surrounding child abuse.[99]

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[88] *Id.* at 1374. Justice Lee stated that "[s]tatutes in derogation of the common law must be strictly construed, and . . . enlarging 'neglect' to mean 'murder' abrogates that rule." *Id.* He also expressed a belief that the statute should be amended by the legislature to extend the exception to child abuse cases. *Id.*

[89] Tapp v. State, 347 So.2d 974, 977 (Miss. 1977).

[90] *Id.*

[91] *Id.* at 976.

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 977.

[96] *Id.* The court stated:

> In *Merritt* the father's crime against the child destroyed the marriage and the conjugal relationship resulting in the separation of the husband and wife and ultimate divorce. Also, Mrs. Merritt voluntarily . . . testified on behalf of the State against her husband. In the [*Tapp* case] there is no charge against appellant for assaulting his wife . . . for which the statute specifically grants an exception. Appellant's wife lived with him subsequent to the death of her child and stated that she loved him.

Id. For this reason the court held that it was reversible error to compel the wife to testify. *Id.*

[97] See note 96 *supra.*

[98] 347 So.2d at 978.

In direct response to *Tapp,* a Bill was enacted by the Mississippi Legislature amending section 13-1-5 to include specifically a criminal prosecution against a spouse for child abuse as a conflict between husband and wife, thereby abrogating the marital privilege in child abuse cases.[100] This amendment aligns Mississippi with the modern trend, for at least twenty states have abrogated by statute the marital privilege in child abuse cases.[101] Embodying a highly preferable viewpoint, the amended statute realistically confronts the problem of child abuse. Because child abuse usually occurs in the home, only the parents or other children generally know of the abuse.[102] Allowing a parent to mistreat a child and to invoke the marital privilege to prevent the other spouse from testifying at a subsequent trial would only encourage the abuse of children in the home.

The *Tapp* decision represents an antiquated view of a serious problem. The court's decision in *Merritt,* by dropping the shield of immunity in child abuse cases to allow firsthand testimony about the incident that would not otherwise be available, properly advocated protection for the child. Unfortunately, however, the *Tapp* majority decided the issue on the question of the voluntary nature of the testimony alone,[103] ignoring even a logical construction or analysis of the statutory language.[104] Fortunately, the legislature remedied the situation with its amendment of section 13-1-5, which supersedes the *Tapp* decision.

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[99] *Id.*

[100] Act of March 23, 1978, 1978 Miss. Laws ch. 395. The pertinent language in the current statute provides, "Either spouse is a competent witness and may be compelled to testify against the other in any criminal prosecution of either husband or wife for a *criminal act* against any child . . . ." MISS. CODE ANN. § 13-1-5 (Supp. 1977).

[101] Daly, *Willful Child Abuse and State Reporting Statutes,* 23 U. MIAMI L. REV. 283, 330-31 (1969). For a complete analysis of each state's laws regarding child abuse reporting, including rules and privileges, see Comment, *Legal Response to Child Abuse,* 11 WM. & MARY L. REV. 960, 968-81 (1970). Some states have abrogated the privilege for instances of child abuse by statute. *E.g.,* ALA. CODE tit. 26 ch. 14 § 10 (1975); ARK. STAT. ANN. § 42-815 (1977); LA. REV. STAT. ANN. § 14:403 (West 1974). Other jurisdictions have established the trend away from the privilege in child abuse cases through case law. *E.g.,* United States v. Allery, 526 F.2d 1362, 1365-67 (8th Cir. 1975); Balltrip v. People, 157 Colo. 108, 401 P.2d 259, 263 (1965); People v. Ogg, 182 N.W.2d 570, 578 (Mich. 1970); State v. Hawthorn, 523 S.W. 2d 332, 334 (Mo. 1975); Chamberlain v. State, 348 P.2d 280, 284-85 (Wyo. 1960).

[102] Daly, *supra* note 101, at 330-31; Comment, *Evidentiary Problems in Criminal Child Abuse Prosecutions,* 63 GEO. L.J. 257, 258 (1974). *See generally* Fraser, *A Pragmatic Approach to Current Legislative Approaches to Child Abuse,* 12 AM. CRIM. L. REV. 103, 112-15 (1974).

[103] The court's decision in *Tapp* seems to indicate either a lack of understanding of the *Merritt* case or of the privilege concept in general. Voluntariness of the testimony is a poor distinction to draw. Either a communication is privileged or it is not. If it is privileged, under the statute both husband and wife must waive the privilege or neither spouse may testify, voluntarily or otherwise. If the testimony is not privileged the court has a right

B. *Hearsay Exception for Prior Identification*

Another significant development in Mississippi's evidentiary law occurred in *Fells v. State*,[105] in which the Mississippi Supreme Court adopted prior identification as an exception to the hearsay rule.[106]

Prior to 1977, the Mississippi rule was that testimony of an earlier identification of the defendant by a witness was inadmissible hearsay, since it permitted the unfair bolstering of an in-court identification.[107] In *Fells*, however, the court adopted a rule allowing admission of an extrajudicial identification as substantive evidence of identity by a wit-

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to hear the testimony. The court should have either overruled *Merritt* or allowed the wife to testify. The holding in *Tapp* only seems to confuse the law in this area. *See generally* C. McCormick, Handbook of the Law of Evidence § 83, at 169-70 (2d (E. Cleary) ed. 1972).

[104] At least in his dissent in *Merritt*, Justice Lee made the logical argument that the act of violence against the child was not within our statute and therefore the wife should not have been allowed to testify. 339 So.2d at 1374. This argument was based on a literal reading of the statute which, at that time, did not cover the situation of the abused child. He should have made the same argument in *Tapp* instead of distinguishing *Merritt* on the basis of voluntariness of the testimony.

[105] 345 So.2d 618 (Miss. 1977).

[106] *Id.* at 621-22. Prior identification, an exception to the hearsay rule, allows a witness to testify about a prior extrajudicial identification in court as long as the defendant is available for cross-examination. The situation arises when A testifies that B identified C as the person who committed the crime or if B himself testifies that he made the identification. C. McCormick, *supra* note 103, § 251, at 603.

> Prior identification confrontations generally occur when police request an eyewitness to a crime, often the victim, to identify a suspect through one of these procedures: (1) a line-up, where a suspect is observed in a group by the witness, (2) a showup, where the suspect is presented alone, or (3) a photograph or photographs, where the eyewitness views the suspect's photograph. The photograph may show the suspect alone or in a group.

Comment, *The Use of Prior Identification Evidence in Criminal Trials Under the Federal Rules of Evidence*, 66 J. Crim. L. and Criminology 240, 240 n.3 (1975). Another case creating an exception to the hearsay rule was Fairley v. State, 349 So.2d 1050 (Miss. 1977). In *Fairley*, the court upheld the admission of a purely hearsay statement on the basis that the appellant's lawyer was equally at fault with the prosecutor for letting it in. *Id.* at 1052.

[107] 345 So.2d at 621. *See* Porter v. State, 339 So.2d 564, 565-66 (Miss. 1976) (reversible error to allow testimony of an extrajudicial identification of defendant after a witness had made a positive in-court identification of him); Butler v. State, 217 So.2d 3, 6 (Miss. 1968) (the state should not offer in evidence testimony concerning an extrajudicial identification); Short v. State, 211 So.2d 545, 546-47 (Miss. 1968) (reversible error to allow testimony of an extrajudicial identification to bolster in-court identification); Anderson v. State, 171 Miss. 41, 48, 156 So. 645, 647 (1934) (bolstering testimony of a witness by use of a prior consistent statement is impermissible).

ness who is available for cross-examination.[108] The court also noted that it would permit the testimony of such an identification by third parties, if they were available for cross-examination.[109] Relying on several cases from other jurisdictions,[110] our court added the limitation that the prior identification must be impeached before the testimony of a third party may be admitted.[111]

The *Fells* case involved admission of the testimony of a witness about her out-of-court identification of the defendant shortly after the commission of the crime involved.[112] The court, in affirming the conviction,[113] specifically modified a prior line of cases[114] and adopted the new rule from a divergent line of cases from other jurisdictions.[115] The reasons for the *Fells* court's admission of this type of testimony were that there might be a loss of memory or loss of certainty about the identification due to a lapse of time[116] and that the reliability of the testimony is ensured because the identification is the nearest in time to the incident and the witness will be subject to cross-examination.[117]

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[108] 345 So.2d at 621-22. The court stated:

> [T]he principal witness to a crime may testify concerning an out-of-court identification whether it occurs in a police lineup, a personal confrontation or otherwise because the initial identification being nearest in time to the event has, in our opinion, the greater likelihood of accuracy and truthfulness being undimmed by fading memory and intervening events occasioned by the passage of time.

Id. at 622.

"Moreover, it would seem that the 'best evidence' of identification is normally the first identification because it is nearest in time to the crime." *Id.* at 621 (quoting 4 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1130, at 277 (Chadbourne rev. 1972)).

[109] 345 So.2d at 621-22.

[110] See note 115 *infra.*

[111] *Id.* at 622. The Court further stated that "if the principal witness' identification is impeached, the independent evidence of the identification may be introduced through third persons present at the out-of-court identification." *Id.*

[112] 345 So.2d at 620. The defendant was convicted of armed robbery and appealed on the ground that the admission of testimony of the victim and a police officer about an extrajudicial identification made 30 to 45 minutes after the robbery was error since it was clearly hearsay. *Id.* at 619-20. This case also involved the question of right to counsel at preindictment line-ups. The court acknowledged the rule announced by the United States Supreme Court in *Kirby v. Illinois,* 406 U.S. 682, 687-91 (1972), that the right to counsel does not apply to preindictment line-ups. 345 So.2d at 620-21. Another case this year dealing with this subject is Clubb v. State, 350 So.2d 693, 695-96 (Miss. 1977) (photographic line-up did not violate defendant's right to counsel). For a general discussion of this area, see Comment, *Pretrial Identification Confrontations,* 45 MISS. L.J. 489 (1974).

[113] 345 So.2d at 622.

[114] *Id.* The court held that the following cases should be modified to allow a witness to testify about an out-of-court identification he makes and to allow third parties to testify about the identification if the principal witness' identification is impeached: Porter v. State, 339 So.2d 564 (Miss. 1976); Butler v. State, 217 So.2d 3 (Miss. 1968); Short v. State, 211 So.2d 545 (Miss. 1968); Anderson v. State, 171 Miss. 41, 156 So. 645 (1934).

[115] 345 So.2d at 622. The cases cited include People v. Gould, 54 Cal. 2d 621, 354 P.2d 865, 867-68, 7 Cal. Rptr. 273, 275 (1960) (extrajudicial identification admitted as independent evidence); Martin v. Commonwealth, 210 Va. 686, 173 S.E.2d 794, 799 (1970) (identification immediately following offense admitted where witness unable to make an in-court

Justices Smith, Inzer and Broom dissented on the ground that the reliability of the identification is not guaranteed merely because it was made nearest in time to the incident. Rather, the identification is less likely to be reliable because it is made under conditions of "excitement, nervous strain, and downright mortal fear."[118] The dissenters also argued that allowing a third party to testify would deprive the defendant of a fair trial because allowing the testimony of a prosecutorial official present at the line-up is unfair bolstering by pure hearsay.[119]

The *Fells* court's adoption of prior identification as an exception to the hearsay rule is a liberal step for the Mississippi court. The broadening of the type of statements admissible under the hearsay rule has been the subject of much debate.[120] But the prior identification exception, already adopted in many jurisdictions,[121] is certainly sound since the

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identification); State v. Simmons, 63 Wash. 2d 17, 385 P.2d 389, 391-92 (1963) (extrajudicial identification is substantive evidence).

[116] 345 So.2d at 621.

[117] *Id.* In People v. Gould, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960), the California court noted:

> Unlike other testimony that cannot be corroborated by proof of prior consistent statements unless it is first impeached, evidence of an extrajudicial identification is admitted regardless of whether the testimonial identification is impeached because it has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind.

354 P.2d at 867, 7 Cal. Rptr. at 275; *accord*, 4 J. WIGMORE, *supra* note 108, § 1130, at 277.

[118] 345 So.2d at 623.

[119] *Id.* at 622-23.

[120] The United States Supreme Court acknowledged the problem in Gilbert v. California, 388 U.S. 263 (1967) by stating:

> There is a split among the States concerning the admissibility of prior extrajudicial identifications, as independent evidence of identity, both by witnesses and third parties present at the prior identification. It has been held that the prior identification is hearsay, and when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at trial.

Id. at 272 n.3.

[121] For cases in addition to those cited in note 115 *supra*, see People v. Cook, 33 Ill.2d 363, 211 N.E.2d 374, 378 (1965); Bean v. State, 234 Md. 432, 199 A.2d 773, 779 (1964); State v. Nunes, 251 Ore. 49, 444 P.2d 542, 543-44 (1968); State v. Jiron, 27 Utah 2d 21, 492 P.2d 983, 984-85 (1972). The Federal Rules of Evidence have also adopted a rule of

trial judge still has the power to exclude the identification from evidence where it appears that the defendant's rights have been violated during the identification process.[122] By allowing the court to take advantage of a properly conducted line-up procedure, the *Fells* decision helps improve the inadequate procedure of in-court identifications.

Critics of this exception base their attack primarily upon the doubtful reliability of the witness' perception and memory. Since the witness is under stressful conditions at the time of the initial identification,[123] the critics argue, he could mistakenly identify the witness in court which could, in turn, result in an unjustified conviction.[124] It is also argued that, in many cases, the identification process itself is unfair or suggestive and may lead to mistaken identification.[125]

The proponents of the exception, however, argue that the identification is reliable because it avoids the dangers inherent in hearsay testimony. Since the identification is closer in time to the actual incident, the proponents argue, the risks of loss of memory and misperception are not as great.[126] In light of this position, the *Fells* court, in adopting this exception to the hearsay rule, revealed a concern for the fact finding procedures of the criminal justice system.

C. *Search Warrants and Affidavits as Evidence*

The Mississippi court held last year in *Hayes v. State*[127] and *Holt v. State*[128] that to allow affidavits for search warrants containing statements of underlying facts to be considered by the jury violates the defendant's right of confrontation.[129] Despite dissents in the two cases calling the admissions harmless error,[130] the majority opinions support the ex-

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prior identification. FED. R. EVID. 801(d)(1)(c). *See generally* Barton & Cowart, *The Enigma of Hearsay,* 49 MISS. L.J. 31 (1978).

[122] Comment, *supra* note 106, at 248-49. For a discussion of identification procedures and safeguards, see Comment, *supra* note 112.

[123] 345 So.2d at 622; Stewart, *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence,* 1970 UTAH L. REV. 1, 8.

[124] For an interesting discussion of mistaken convictions, see E. BORCHARD, CONVICTING THE INNOCENT (1970).

[125] Comment, *supra* note 106, at 246; *see* Palmer v. Peyton, 359 F.2d 199, 202 (4th Cir. 1966) (police secured identification of defendant's voice by showing witness his shirt which was the same color as that of the criminal); People v. Boney, 28 Ill. 2d 505, 192 N.E.2d 920, 922 (1963) (defendant was placed in a lineup with three or four of witness' husband's coworkers personally known to him).

[126] See notes 108, 115, 117 & 121 and accompanying text *supra.*

[127] 348 So.2d 432 (Miss. 1977) (possession of marijuana).

[128] 348 So.2d 434 (Miss. 1977) (armed robbery).

[129] Hayes v. State, 348 So.2d at 433; Holt v. State, 348 So.2d at 439.

[130] In *Holt v. State,* a 5-4 decision, Justice Sugg based his dissent on three grounds. First, the affidavit did not go to the jury. Second, the defendant's right of confrontation

clusion of the affidavits to guard against the dangers of prejudicial hearsay evidence.[131]

In *Hayes* and *Holt* the court relied on the rule and rationale[132] of a 1974 Mississippi decision[133] addressing the issue of admission of affidavits. In that case, the admission of an affidavit was held to be reversible error because it contained damaging hearsay evidence.[134] The supreme court dictated that the validity of the search warrant and the legality of the search are matters for the court to decide.[135] Where the warrant and search are deemed legal, the fruits of the search must then be judged admissible.[136] But if the affidavit and the statement of underlying circumstances contain hearsay, they may not be admitted as evidence to support the charge.[137] This rule, which protects the criminal suspect from the dangers of prejudicial hearsay evidence, is followed by several jurisdictions.[138]

Hayes and *Holt* have precedential value, however, beyond the mere application of a general rule. Although in *Hayes* the lower court admitted the affidavit into evidence, it was not taken into the jury room.[139] The dissent argued, therefore, that the jury could not be prejudiced by something it could not see.[140] In *Holt* the majority was satisfied that the affidavit and underlying fact sheet actually went to the jury for consid-

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guaranteed by the sixth amendment was not denied because all persons named in the affidavit and underlying fact sheet were called as witnesses. Third, even if the affidavit was shown to the jury, it constituted harmless error under MISS. SUP. CT. R. 11. 348 So.2d at 439.

MISS. SUP. CT. R. 11 provides:

> No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment resulted in a miscarriage of justice.

Id. Specially concurring in *Hayes,* Justice Sugg states his belief that the introduction of affidavits into evidence was harmless error. 348 So.2d at 433.

[131] Hayes v. State, 348 So.2d at 433; Holt v. State, 348 So.2d at 439.

[132] Hayes v. State, 348 So.2d at 433; Holt v. State, 348 So.2d at 439.

[133] Sisk v. State, 290 So.2d 608 (Miss. 1974).

[134] *Id.* at 610.

[135] *Id.*

[136] *Id.*

[137] *Id.* Affidavits and warrants are admissible in evidence when their contents are material, but not for the purpose of showing guilt of the crime charged therein. Torrence v. State, 283 So.2d 595, 597 (Miss. 1973).

[138] *E.g.,* Berry v. State, 202 Md. 62, 95 A.2d 319, 320 (1953); Royal v. State, 490 P.2d 777, 777 (Okla. 1971); Brown v. State, 159 Tex. Crim. 357, 264 S.W.2d 119, 210 (Crim. App. 1954); Swift v. Commonwealth, 199 Va. 420, 100 S.E.2d 9, 13 (1957).

[139] 348 So.2d at 433. The district attorney's motion to exclude the affidavit from the jury room was sustained. *Id.*

[140] *Id.*

eration,[141] but there was doubt among the dissenters that the documents were so submitted.[142] Based on *Hayes,* it seems that in view of these subtle factual differences the mere introduction of this material into evidence constitutes reversible error.[143] On the other hand, *Holt* implies that the jury's consideration of the material is the controlling element in determining whether the error is reversible.[144]

Construing *Holt* and *Hayes* together, one may readily see the difficulty of having an affidavit for a search warrant brought before the jury, or even introduced into evidence at all. Thus, if an attorney seeking the admission of such material has knowledge that affidavits and statements of underlying circumstances contain prejudicial hearsay evidence, there appears to be no reason to seek admission of the documents into evidence. The validity of the warrant is to be determined in a preliminary setting by the judge; the evidence procured by the legal search is to be introduced at trial within the rules governing admissibility of evidence. These decisions by the supreme court should settle once and for all the issue of admission of affidavits through which prejudicial hearsay evidence is susceptible of admission.

III. CONCLUSION

Although the 1977 Mississippi Supreme Court rendered several interesting and precedentially significant decisions in the area of capital punishment, many questions remain for consideration by the court in future years.[145] Still, the supreme court indicated a keen sensitivity to modern developments in criminal procedure and a tendency to conform to the modern trends evolving in that area of the law.

Mississippi's rules of evidence were substantially affected by the decisions made by the court in 1977. Prompt legislative response to one unfortunate decision[146] brought about the much needed abrogation of the marital privilege in child abuse cases.[147] The court adopted the prior identification exception to the hearsay rule[148] and also fashioned an interesting rule dealing with the admissibility of affidavits for search warrants into evidence.[149] The Mississippi judiciary should continue to reshape the state's evidentiary laws and procedural rules to conform and evolve with modern developments in these areas.

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[141] 348 So.2d at 439. The affidavit and fact sheet were admitted into evidence; the jury was instructed to consider "the testimony and the exhibits offered and received." *Id.*

[142] *Id.* at 438-39.

[143] 348 So. 2d at 433.

[144] *Id. Hayes* can be distinguished from *Holt* on this basis. The consideration by the jury of the prejudicial hearsay evidence is the ground for reversible error. This was the thread that binds the cases in note 138 *supra.*

[145] See notes 49 through 65 and accompanying text *supra.*

[146] See note 77 and accompanying text *supra.*

[147] See notes 100 through 102 and accompanying text *supra.*

[148] See notes 105 through 111 and accompanying text *supra.*

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[149] See notes 127 through 144 and accompanying text *supra.*

DOMESTIC RELATIONS

During 1977, the Mississippi Supreme Court considered ten cases dealing with domestic relations, four of which merited commentary.[1] Aligned with precedent, the decisions were, for the most part, predictable. Even so, the court's steady reaffirmation of basic principles of child custody, separate maintenance, and alimony seemed to conflict with many modern developments in the area of domestic relations. The following discussion is designed to reveal several arguments that could be made in the future when analogous situations arise. It is hoped that these arguments will help persuade the court to change its views to reflect today's attitudes.

I. Child Custody and Adoption

In the past, the Mississippi judiciary has followed three basic rules regarding child custody.[2] First, the court has applied the parental preference rule, which raises the presumption that the natural parent is preferred over strangers.[3] Second, the idea that custody should lie where the best interests of the child will be served has been recognized.[4] Finally, a hybrid rule has been applied in some situations, reflecting the notion that a child's best interest will be served by awarding custody to the natural parents.[5]

The Mississippi legislature has also indicated a preference for natural parents in adoption proceedings by requiring a party trying to adopt a child over the objection of the child's natural parents to show that the parents have "abandoned or deserted such infant or [are] mentally, or morally, or otherwise unfit to rear and train it."[6] Thus, in an adoption proceeding, the chancellor must determine that one of the grounds for adoption exists—abandonment or moral unfitness.[7]

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[1] For decisions rendered during 1977, but not noted here, see notes 48, 87 & 88 *infra.*

[2] *See generally* 43 Miss. L.J. 247 (1972).

[3] Ford v. Litton, 211 So. 2d 871, 873 (Miss. 1968); Newman v. Sample, 205 So. 2d 650, 651 (Miss. 1968); Nickle v. Burnett, 122 Miss. 56, 64-65, 84 So. 138, 140 (1920) (en banc).

[4] Thompson v. Foster, 244 So. 2d 395, 396 (Miss. 1971) (per curiam); *see* Drew v. Drew, 249 Miss. 26, 34, 162 So. 2d 652, 655-56 (1964) (where mother was unfit and father failed to show he had a secure home, children could be sent to an orphanage); Duncan v. Duncan, 119 Miss. 271, 279-80, 80 So. 697, 700 (1919) (en banc) (child should be placed with parent best able to provide care). One student commentator has considered *Drew* to be "the fartherest extension of the best interest of the child rule." 43 Miss. L.J. 247, 249 (1972).

[5] Reynolds v. Davidow, 200 Miss. 480, 484, 27 So. 2d 691, 692 (1946) (presumption that welfare is best promoted by parents is rebuttable); J. Bunkley & W. Morse, Amis on Divorce and Separation in Mississippi § 8.01, at 211-12 (1957).

[6] Miss. Code Ann. § 93-17-7 (1972).

Last year, the Mississippi Supreme Court confronted these issues in *In re Yarber,*[8] where a petition was filed[9] in chancery for adoption of two children[10] by their mother's second husband. The chancellor, granting the adoption, charged the appellant, the children's father, with "callous indifference to the welfare of his children"[11] and adjudged him to be unfit to raise the children.[12] On appeal to the Mississippi Supreme Court, the decision was reversed and the decree for adoption set aside. The court reasoned that in an adoption proceeding, children will not be taken away from their natural parent unless it is clearly shown that the parent has abandoned the children or is morally unfit.[13] In so holding, the court stated that "a callous indifference to the welfare of his children" did not constitute abandonment by the appellant.[14]

The conclusion of the *Yarber* court concerning the matter of abandonment is consistent with prior Mississippi case law,[15] but the decision regarding the appellant's moral fitness defies logic. Indeed, the court seems to ignore a previous instance where the appellant shot the appellee.[16] It is especially difficult to understand how the holding benefits the children, since the court points out that appellees loved the children, were willing and anxious to educate them, and could provide for them a better standard of living.[17] Exhibiting the supreme court's tendency to adhere to the parental preference rule, the *Yarber* decision indicates that the best interests of a child must yield to the sometimes unfortunate circumstances of his or her birth.

The supreme court's decision in *Yarber* was not the only case rendered in 1977 which involved child custody or adoption. In *Harris v.*

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[7] *Id.*

[8] 341 So. 2d 108 (Miss. 1977).

[9] Appellees were the natural mother and stepfather of the children. *Id.* at 108.

[10] They were children of the former marriage of Frances L. Dearman, appellee, and Alton Yarber, appellant. *Id.*

[11] *Id.* at 108-09. Appellant sporadically paid small amounts of support, visited the children about once every six months, called them infrequently, and sent Christmas presents to them. *Id.*

[12] *Id.* at 109. This charge stemmed from an incident at the Dearman's home wherein Mr. Yarber shot Mr. Dearman four times with a .25 caliber pistol. *Id.*

[13] *Id.* at 109-10.

[14] *Id.* at 109.

[15] *See* Ford v. Litton, 211 So. 2d 871, 873 (Miss. 1968) (abandonment not found unless it has been clearly proved); *In re* Hall, 202 So. 2d 641, 642 (Miss. 1967) (only allegation was neglect over a short period, not abandonment). *But see* Reynolds v. Davidow, 200 Miss. 480, 485, 27 So. 2d 691, 692 (1946) (en banc) (parents were unsuitable and had abandoned the child).

[16] See note 12 *supra.*

[17] 341 So. 2d at 110.

Harris,[18] Mr. Harris sought to change a divorce decree awarding Mrs. Harris custody of their son.[19] He alleged that Mrs. Harris, a member of the Free Will Holiness Pentecostal Church, endangered the child by exposing him to religious services that involved the handling of snakes, a practice Mr. Harris contended warranted a change in custody.[20] Although the testimony revealed that snakes were not actually handled at Mrs. Harris' home church, the chancellor ordered that Mr. Harris should have custody of the child.[21] On appeal, the supreme court disagreed, holding that the chancellor had no authority to dictate what religion a parent should teach her child so long as the child is not exposed to any danger.[22] The court further stated that religious beliefs should not be grounds for modification of a custody decree.[23]

Without reference to a single case in the opinion, the *Harris* court relied solely upon a constitutional analysis,[24] interpreting both the first amendment of the United States Constitution[25] and the corresponding provision of the Mississippi Constitution.[26] Although *Harris* was a case of first impression for the Mississippi Supreme Court, other jurisdictions have rendered decisions confronting the problematic interplay of child custody and religious freedom with somewhat inconsistent results.[27] This inconsistency was caused by the conflict between the parent's first amendment right to exercise freely his or her religion and the judiciary's concern for the best interests of the child, a concern involving considerations of the potentially detrimental physical and psychological effects of an unorthodox religion upon a young child.[28] The *Harris* controversy was exemplary of this dilemma. The original decree in chancery followed the general practice of deciding which parent's custody would be better for the child.[29] The supreme court, however, in leaving the child with Mrs. Harris, analyzed her religious practices and decided that Mr. Harris failed to prove a sufficient change in circumstances to merit a change in custody.[30] The court's decision was probably correct, assuming Mrs. Harris' congregation did not actually endanger the child.[31] Nonetheless, the court failed to address several important issues in this area.

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[18] 343 So. 2d 762 (Miss. 1977).

[19] *Id.* at 763.

[20] *Id.* The proof offered was limited to an instance of the father's insistence on going to a different Free Will Holiness Pentecostal Church from the one attended by the mother. *Id.*

[21] *Id.* The chancellor held the church doctrines "detrimental to the growth, welfare and intellectual development" of the child. *Id.*

[22] *Id.* at 764.

[23] *Id.*

[24] *Id.*

[25] U.S. CONST. amend. I.

[26] MISS. CONST. art. 3, § 18. Section 18 states that the "free enjoyment of all religious sentiments and the different modes of worship shall be held sacred." *Id.*

[27] *Compare* Smith v. Smith, 90 Ariz. 190, 367 P.2d 230, 233 (1961) (en banc) (teachings that do not violate the law, do not justify depriving parents of custody) *and* Meredith v. Meredith, 91 Idaho 898, 434 P.2d 116, 119 (1967) (parent not unfit just because of membership in Jehovah Witness Church) *and* Frantzen v. Frantzen, 349 S.W.2d 765, 767-68 (Tex. Ct. App. 1961) (religious beliefs that are moral and legal do not make parent unfit) *with* Stapley v. Stapley, 15 Ariz. App. 64, 485 P.2d 1181, 1187 (1971) (Jehovah Witness parents lost custody for refusal to permit blood transfusions) *and* Stanton v. Stanton, 213 Ga. 545, 100 S.E.2d 289, 293 (1957) (religious training is a factor to be considered in custody question).

[28] *Compare* Smith v. Smith, 90 Ariz. 190, 367 P.2d 230, 233 (1961) (en banc) (mere

One issue not confronted by the *Harris* court involves the conflict between the constitutional rights of the parents and their children.[32] The prevailing attitude in the United States has always been that persons below the age of majority should be subject to the control of the parents or the state.[33] Thus, when actions by the parents have posed serious threats to the health or well-being of a child, a state statute has always been interposed to prevent the abuse.[34] However, in the past decade, the tribunals in some jurisdictions have recognized that minors do have constitutional rights that should be protected.[35]

Although only one state provides for mandatory representation of children in domestic relations litigation,[36] many other jurisdictions give

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deviations from norms do not justify loss of custody) *with* Battaglia v. Battaglia, 9 Misc. 2d 1067, 172 N.Y.S.2d 361, 362 (Sup. Ct. 1958) (parent has right to practice religion, but not to expose child to its "hazards") *and* Stapley v. Stapley, 15 Ariz. App. 64, 485 P.2d 1181, 1187 (1971) (dangerous religious practices may justify loss of custody).

[29] Latham v. Latham, 223 Miss. 263, 273-74, 276, 78 So. 2d 147, 151-52 (1955). The basic tenets of the "best interest" rule go at least as far back as Randall v. Randall, 28 So. 19, 20 (Miss. 1900), where the chancellor's decision on appeal was reversed after an analysis of the relative circumstances of the parents. *See generally* Comment, *No-Fault Divorce: A Proposal for Mississippi,* 45 MISS. L.J. 179, 187-89 (1974).

[30] 343 So. 2d at 764.

[31] Although a caged snake was brought to the ceremony, the members of the congregation did not actually handle it. *Id.*

[32] In Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976), Justice Blackmun stated, "Minors, as well as adults, are protected by the Constitution and possess constitutional rights."

[33] Haren, *Puberty, Privacy & Protection: The Risks of Children's "Rights,"* 63 A.B.A.J. 1383, 1385 (1977).

[34] *Id.*

[35] *See, e.g.,* Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (striking down statute requiring parental consent for unmarried minor's abortion except in emergencies); *In re* Gault, 387 U.S. 1, 30-31, 33, 41, 55 (1967) (minors entitled to certain due process protections); *In re* Snyder, 85 Wash. 2d 182, 532 P.2d 278, 281 (1975) (en banc) (upholding "divorce" of fifteen-year-old from parents for "incompatibility").

[36] MO. REV. STAT. § 453.020 (1976) (applicable to adoptions only). Michigan provides that the prosecutor or a friend of the court shall enter an appearance on behalf of any children of persons seeking a divorce. MICH. COMP. LAWS ANN. § 552.45 (MICH. STAT. ANN. § 25-121 (1967)). His statutory duty, however, is merely to oppose the divorce if the interest of the children or the public requires it. *Id.*

the trial judge the discretionary power to appoint an advocate.[37] Varying in form, some of these statutes provide for the appointment of an attorney,[38] some a guardian ad litem,[39] and a few for either.[40] Basically, however, all these statutes are designed to present the court with a third view less partisan than that of the other parties.[41] Through the vehicle of such legislation, these states have taken an admirable initial step in protecting the rights of minors. Even so, many problems still exist in regard to representation in custody disputes in that the duties and authority of the appointed attorney or guardian ad litem are usually inadequately defined.[42] Seeking resolution of this problem, at least one commentator, Professor Mlyniec, believes that an attorney should only be appointed in cases where the child has a stated preference regarding the issue.[43] This would afford the attorney a position upon which he could pursue a remedy in the traditional legal fashion. Professor Mlyniec also advocates the appointment of a social worker at the outset of the hearing to determine if the child has a preference. If the child does state a preference, then the attorney could be appointed.[44] The author cautions, however, that since the attorney or guardian ad litem is in a particularly influential position, he should restrict his activities and comments to the judge to the traditional role of the advocate representing a client.[45] Accordingly, personal opinions should not be allowed to interfere with his adversary position. Although the notion of representation for children in a custody dispute is still a relatively novel theory suffering from poorly defined standards, there is a great deal of merit in trying to correct a long neglected wrong in child custody cases.

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[37] *E.g.*, ALASKA STAT. § 09.65.130 (Supp. 1977); ARIZ. REV. STAT. ANN. § 25-321 (1976); COLO. REV. STAT. § 14-10-116 (1973); D.C. CODE § 16-918 (1973); HAW. REV. STAT. § 571-46(8) (1976); MD. CTS. & JUD. PROC. CODE ANN. § 3-604 (Supp. 1976); NEB. REV. STAT. § 42-358 (1974); N.H. REV. STAT. ANN. § 458.17-a (Supp. 1977); TEX. FAM. CODE ANN. tit. 2, § 11.10 (Vernon 1978); UTAH CODE ANN. § 30-3-11.2 (1976); VT. STAT. ANN. tit. 15, § 594 (1974).

[38] *E.g.*, ARIZ. REV. STAT. ANN. § 25-321 (1976); COLO. REV. STAT. § 14-10-116 (1973); D.C. CODE § 16-918 (1973); MD. CTS. & JUD. PROC. CODE ANN. § 3-604 (Supp. 1976); NEB. REV. STAT. § 42-358 (1974); UTAH CODE ANN. § 30-3-11.2 (1976); VT. STAT. ANN. tit. 15, § 594 (1974).

[39] *E.g.*, HAW. REV. STAT. § 571-46(8) (1976); MASS. GEN. LAWS ANN. ch. 215, § 56A (West Supp. 1977); N.H. REV. STAT. ANN § 458.17-a (Supp. 1977).

[40] *E.g.*, ALASKA STAT. § 09.65.130 (Supp. 1977); TEX. FAM. CODE ANN. tit. 2, § 11.10 (Vernon 1978).

[41] *See* notes 36 & 37 *supra*. This duty has been described as a responsibility to represent and advocate the best interests of the child. Mlyniec, *The Child Advocate in Private Custody Disputes: A Role in Search of a Standard,* 16 J. FAM. LAW 1, 8 (1977).

[42] Mlyniec, *supra* note 41, at 8-13. At one point, the author explains the difficulty with the best interest test:

> The determination of the best interest of another person requires an ability that few (indeed, if any) persons possess. It requires a thorough understanding of the physical and psychological interrelationship of the child and his parents, as well as an ability to make determinations absent specific guidelines regarding which social forms, conventions, and behavior produce the most well-adjusted and socially productive persons. It assumes that a person possesses an ability to foresee the development of the relationships between the child, the custodial parent and the non-custodial parent, and it also assumes that there is a best way to perform this task. Even psychiatrists, the professionals our society believes most capable of making these predictions, are reluctant to do so. It is understandable that a conscientious judge, trained in the adversary process and generally unfamiliar with social science theories, has difficulty making this decision.

Id. at 12.

[43] *Id.* at 16.

Notwithstanding the *Harris* court's obvious sensitivity to the first amendment rights of parties involved in child custody disputes, the constitutional rights of the child were altogether ignored. Perhaps this was because of the child's tender age. It is more likely, however, that the Mississippi Supreme Court is not ready or willing to concede that very young children have constitutional rights in this context. This unyielding judicial attitude conflicts with recent United States Supreme Court decisions recognizing the constitutionally protected rights of minors.[46] Perhaps the result in *Harris* would have been the same had the child been represented, but the decision would have been much more just had there been an advocate protecting the best interest[47] of the child.[48]

II. SEPARATE MAINTENANCE

There are several problems inherent in the Mississippi law on separate maintenance that must be confronted in the determination of whether one spouse is entitled to separate maintenance upon separation.[49] If one spouse unjustifiably abandons the other, the abandoned spouse may have a right to separate maintenance, even though the statutory period for desertion has not lapsed.[50] A more difficult question arises when the absent spouse contends that the abandonment is justified.[51] The answer to this query usually depends upon the facts and circumstances of a particular situation[52] and the relative difficulty of "allocating fault" in the marital relationship.

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[44] *Id.*

[45] *Id.*

[46] See notes 32 & 35 and accompanying text *supra.*

[47] *See generally* Schiller, *Child Custody: Evolution of Current Criteria,* 26 DEPAUL L. REV. 241 (1977); Comment, *The Tender Years Presumption: Do the Children Bear the Burden?,* 21 S.D. L. REV. 332 (1976).

[48] For other cases decided in 1977 dealing with child custody, see Stevens v. Stevens, 346 So. 2d 909, 912 (Miss. 1977) (setting aside Mississippi proceedings while Alabama court retained jurisdiction over divorce); O'Neal v. Warden, 345 So. 2d 610, 612-13 (Miss. 1977) (voluntary relinquishment of custody for five years precluded automatic recovery of custody upon request).

[49] J. BUNKLEY & W. MORSE, *supra* note 5, § 7.01, at 202.

[50] *Id.* § 7.01, at 202-03.

Last year, in *Rodgers v. Rodgers*,[53] the husband filed for divorce, charging his wife with habitual cruel and inhuman treatment. His wife filed a cross-bill denying the allegations and praying for a divorce on the same grounds.[54] The chancellor denied the divorce but awarded her a decree of separate maintenance.[55] On appeal, the supreme court reversed and rendered, stating that the separation was caused by the fault of both parties, and thus, the wife was not entitled to separate maintenance.[56]

The *Rodgers* decision is wholly consistent with Mississippi law on separate maintenance.[57] It is apparent that the court was met with little difficulty in finding Mrs. Rodgers equally at fault with her husband. Nonetheless, if presented with a more factually complex situation,[58] the

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[51] *Id.*

[52] *Id.* § 7.01, at 203.

In Boyett v. Boyett, 152 Miss. 201, 119 So. 299 (1928), the husband abandoned the wife and went to Chicago in 1926. The chancellor awarded separate maintenance to the wife and also to the child for support. The Mississippi Supreme Court affirmed the child support award but reversed as to the wife, stating that she was without justification in refusing to join him in Chicago. Therefore, he was under no duty to afford her a separate maintenance. *Id.* at 205-06, 119 So. at 300.

[53] 349 So. 2d 540 (Miss. 1977).

[54] *Id.* at 540.

[55] *Id.* The chancellor awarded $200 per month support plus $150 per month child support. *Id.*

[56] *Id.* at 541. Uncontradicted testimony showed the wife had stabbed the husband and had kept a male companion. *Id.*

[57] *See, e.g.,* Cox v. Cox, 279 So. 2d 612, 615 (Miss. 1973) (prerequisite for separate maintenance that wife be substantially free from fault); King v. King, 246 Miss. 798, 803-05, 152 So. 2d 889, 890-91 (1963) (reversing award of separate maintenance because wife was equally at fault); Etheridge v. Webb, 210 Miss. 729, 743, 50 So. 2d 603, 607 (1951) (separate maintenance allowed where wife was abandoned so that separation was without fault on wife's part); Garland v. Garland, 50 Miss. 694, 715-16 (1874) (wife has right to separate maintenance if she is abandoned and is without fault).

On the question of the amount to be awarded, see Gardiner v. Gardiner, 230 Miss. 778, 786, 93 So. 2d 638, 641 (1957) (equitable principles must guide chancellor's use of discretion in awarding separate maintenance); J. BUNKLEY & W. MORSE, *supra* note 5, § 7.01, at 204-05 (separate maintenance is to allow standard of living wife would have had with husband).

[58] For additional cases on separate maintenance, see Bridges v. Bridges, 330 So. 2d 260, 263 (Miss. 1976) (affirming substantial award, but reversing order to sell house for benefit of wife); Howard v. Howard, 243 Miss. 68, 71, 137 So. 2d 191, 193 (1962) (wife's executor allowed to pursue appeal with regard to property rights); Serio v. Serio, 231 Miss. 147, 150-52, 94 So. 2d 799, 801-02 (1957) (affirming award on showing husband was violent and was a poor provider); Conn v. Conn, 184 Miss. 863, 869, 186 So. 646, 646 (1939) (affirming award despite husband's offer to take wife back).

Mississippi court might have some difficulty in deciding the percentage of fault to allocate between the parties.

A possible solution to this problem would be to eliminate fault completely as a criterion for awarding maintenance. The consideration of fault effectively allows one party to obtain an economic advantage over the other, regardless of the financial positions of the respective parties. Under the Uniform Marriage and Divorce Act, consideration of the conduct of either spouse in the award of maintenance is specifically excluded.[59] A few states have followed this lead and eliminated the consideration of fault.[60] When fault is eliminated from consideration by the court, the tribunal can proceed directly to more pertinent issues, such as the financial status of the parties, employability, and accustomed standard of living, and can avoid the quagmire of emotional issues present in any domestic relations case. Besides leading to a more just result, eliminating fault would invariably resolve the case more expeditiously and lighten the emotional impact on the respective parties.

III. ALIMONY AND CHILD SUPPORT

In Mississippi, the supreme court will not disturb a chancellor's award of alimony unless it is manifestly erroneous.[61] However, since the decision of what guidelines are to be followed in awarding permanent alimony presents quite a problem,[62] the Mississippi legislature has en-

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[59] Uniform Marriage and Divorce Act § 308(b).

[60] Iowa refuses to allow consideration of fault, although not expressly prohibited by statute. *In re* Marriage of Zoellner, 219 N.W.2d 517, 524 (Iowa 1974) (en banc). Oregon adopted a statute similar to Uniform Marriage and Divorce Act § 308 except that a provision for consideration of "such other matters as the court shall deem relevant" may allow "fault" to creep into the deliberation. ORE. REV. STAT. § 107.105(c)(I) (1977).

[61] Aldridge v. Aldridge, 200 Miss. 874, 877, 27 So. 2d 884, 885 (1946) (en banc); J. BUNKLEY & W. MORSE, *supra* note 5, § 6.08, at 189.

[62] *See* Aldridge v. Aldridge, 200 Miss. 874, 878, 27 So. 2d 884, 885 (1946) (en banc) ("benefit to the wife" must be balanced against "correlative burden upon the husband"); Hibner v. Hibner, 217 Miss. 611, 617, 64 So. 2d 756, 758 (1953) (reasonable award must be based on wife's standard of living and husband's ability to pay).

The court clarified the criteria for awarding alimony in Brabham v. Brabham, 226 Miss. 165, 176, 84 So. 2d 147, 153 (1955):

> On remand, the lower court should award reasonable sums for alimony and support for the minor child in the light of conditions as they now prevail, including (1) the health of the husband and his earning capacity; (2) the health of the wife and her earning capacity; (3) the entire sources of income of both parties; (4) the reasonable needs of the wife; (5) the reasonable needs of the child; (6) the necessary living expenses of the husband; (7) the estimated amount of income taxes the respective parties must pay on their incomes; (8) the fact that the wife has the free use of the home, furnishings and automobile, and (9) such

acted a statute departing from the general rule. Section 95-5-23 of the Mississippi Code states that, after an award of alimony, "[t]he court may . . . , on petition, change the decree, and make from time to time such new decrees as the case may require."[63] The broad language of the statute has contributed to some unpredictable decisions by the Mississippi courts when confronted by a petition for modification of an alimony award.[64]

In 1977, the Mississippi court rendered a decision that would seem to continue this trend of unpredictability. In *Taylor v. Taylor,*[65] Charles B. Taylor and his wife Bobbie were divorced in 1975 and Mr. Taylor was ordered to pay alimony and child support.[66] Subsequently, Mrs. Taylor petitioned the court to have Mr. Taylor adjudged in contempt for failure to pay alimony. In his answer, Mr. Taylor asked for a modification hearing.[67] The chancellor, among other things,[68] reduced the alimony to seventy dollars per month and ruled that Mr. Taylor was in contempt of court for failure to make previous payments.[69] On appeal, the Mississippi Supreme Court reversed both the reduction in alimony and the

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other facts and circumstances bearing on the subject that might be shown by the evidence.

[63] Miss. Code Ann. § 93-5-23 (1972).

[64] *Compare* Kincaid v. Kincaid, 213 Miss. 451, 456, 57 So. 2d 263, 265 (1952) (modification request not heard until amounts due are paid) *and* Dickerson v. Horn, 219 Miss. 655, 660, 50 So. 2d 368, 370 (1951) (despite contempt citation, husband left free to work to pay alimony) *and* Ramsey v. Ramsey, 125 Miss. 185, 197, 87 So. 491, 493 (1921) (affirming contempt citation, but releasing husband to go to work) *and* Hamblin v. Hamblin, 107 Miss. 113, 117-18, 65 So. 113, 114 (1914) (affirming imprisonment for failure to pay alimony) *and* Millis v. State, 106 Miss. 131, 141, 63 So. 344, 345 (1913) (same) *with* Nichols v. Nichols, 254 So. 2d 726, 727 (Miss. 1971) (reduction ordered where wife's income exceeded husband's) *and* De Marco v. De Marco, 199 Miss. 165, 167, 24 So. 2d 358, 359 (1946) (en banc) (upholding reduction after husband arbitrarily started reduced payments) *and* Lee v. Lee, 182 Miss. 684, 689, 181 So. 912, 912-13 (1938) (affirming reduction begun by husband immediately after filing for modification) *and* Miller v. Miller, 173 Miss. 44, 66-67, 159 So. 112, 120 (1935) (disallowing award of attorneys' fees because wife had own income) *and* Schlom v. Schlom, 149 Miss. 111, 115-16, 115 So. 197, 198 (1928) (reduction approved where husband assumed burden of caring for children formerly in wife's custody).

[65] 348 So. 2d 1341 (Miss. 1977).

[66] *Id.* at 1342. Mr. Taylor's failure to contest the divorce produced a decree ordering $200 per month child support and $100 per month alimony. *Id.*

[67] *Id.* Mr. Taylor contended the award was oppressive and went beyond his financial means. *Id.*

[68] The chancellor held that Taylor was to pay the $650 already owed in alimony and attorneys' fees plus an additional $250 sum for attorneys' fees incurred in the present action. To ensure future payments, the chancellor ordered Taylor to submit a $420 bond and ordered the clerk to "issue process for Taylor's arrest and confine him in '[j]ail until such time as he does enter into bond or until such time as he makes said alimony payments.'" *Id.* at 1342-43.

[69] *Id.*

contempt citation.[70] The court held that in a modification hearing for reduction of alimony payments, the petitioner must show that it is wholly impossible for him to pay even a fraction of the payments.[71]

In a vigorous dissent, Justice Smith noted that alimony is not designed to serve as a punishment of the husband, implying that enforcement of the original alimony decree by the *Taylor* majority amounted to just that.[72] Justice Smith seemed to scoff at the majority's reasoning, which justified continuance of the alimony by noting that part of Mr. Taylor's income was used for pleasure.[73]

The opinion of Justice Smith reflects the measure of flexibility necessary in dealing with marital problems. Such flexibility is totally absent in the harsh standard espoused by the majority.[74] Unless future opinions are rendered in a legal vacuum, it is questionable whether the *Taylor* decision will survive the impact of ever-changing social attitudes, especially in regard to gender based discrimination. For example, it may be argued that alimony payable only to the wife is a violation of the equal protection clause of the fourteenth amendment of the United States Constitution.[75] Only a few jurisdictions other than Mississippi still maintain statutes that make alimony recoverable by females only,[76] upholding the common law concept of the husband's duty to support his wife. It is arguable that these statutes, including Mississippi's, are unconstitutional in light of recent gender based discrimination cases decided by the United States Supreme Court.[77] The Mississippi court might, however, manufacture a rational purpose for the statute preferring one gender over the other by utilizing arguments that women are forced into an economic classification inferior to that of most men,[78] that women are incapable of successfully competing on an equal basis with men in certain situations,[79] or that the situation involved is not one in which one gender is protected and the other is not protected.[80] Other jurisdictions have faced equal protection challenges to alimony awards and have upheld the constitutionality of the statutes involved.[81] Thus, the Mississippi statute[82] would probably withstand an attack on equal protection grounds since such arguments have enjoyed little success in alimony matters.[83]

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[70] *Id.* at 1343. The Supreme Court raised the alimony back to $100 per month, reduced the additional attorneys' fees to $125, and overruled the chancellor's decree giving the clerk the standing power to issue a warrant for Taylor's arrest upon failure to pay alimony. The standing authority to order an arrest deprived Mr. Taylor of due process under the fourteenth amendment. *Id.*

[71] *Id.* An itemization of Taylor's living expenses showed that he spent $48 per month on gasoline, which was partly for pleasure and showed expenses for cigarettes, club dues, movies and "one thing and another." *Id.*

[72] *Id.* at 1344 (Smith, J., dissenting).

[73] *Id.* Justice Smith concluded, "One can hardly imagine a more austere existence or more frugal indulgence in personal 'pleasures' than Taylor's —nothing has been more truly said than this, 'Man does not live by bread alone.' " *Id.*

[74] See note 71 and accompanying text *supra*.

[75] U.S. CONST. amend. XIV, § 1 provides in part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[76] ALA. CODE § 30-2-50 (1977); ARK. STAT. ANN. §§ 34-1210, -1211 (1962); GA. CODE ANN. §§ 30-201, -202, -209, -210 (1969 & Supp. 1977); IDAHO CODE §§ 32-704, -706 (1963); MISS. CODE ANN. § 93-5-23 (1972); N.Y. DOM. REL. LAW § 236 (McKinney 1977); P.R. LAWS ANN. tit. 31, § 385 (1967); R.I. GEN. LAWS §§ 15-5-6, -16 (1969); S.C. CODE §§ 20-3-120, -130 (1976); S.D. COMPILED LAWS §§ 25-4-38 to -40 (1976) (temporary alimony only); TENN. CODE ANN. § 36-820 (1977); WYO. STAT. §§ 20-2-102, -114 (1977).

Perhaps a more effective means of attacking gender based discrimination in domestic relations cases is through the enactment of a state equal rights amendment or the passage of the proposed national equal rights amendment.[84] Pennsylvania has passed an equal rights amendment to its state constitution that has already been used to mitigate the inequities of sex based discrimination in the awarding of child support.[85] Still, application of the state equal rights amendment to alimony disputes has brought about somewhat checkered results.[86]

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[77] *See, e.g.,* Stanton v. Stanton, 421 U.S. 7, 14 (1975) (striking statute that set lower age of majority for women); Weinberger v. Wiesenfeld, 420 U.S. 636, 651-53 (1975) (striking statute that gave death benefits to women only); Reed v. Reed, 404 U.S. 71, 76-77 (1971) (striking statutory preference for male administrators of estates).

[78] *See* Kahn v. Shevin, 416 U.S. 351, 355-56 (1974) (justifying tax exemption for widows that excluded widowers).

[79] *See* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (different promotion standards justified by different opportunities available to female officers in the military).

[80] *See* Geduldig v. Aiello, 417 U.S. 484, 494-96 (1974) (insurance programs may exclude pregnancies).

[81] Stern v. Stern, 165 Conn. 190, 332 A.2d 78, 80 (1973); Murphy v. Murphy, 232 Ga. 352, 206 S.E.2d 458, 459 (1974) (citing Kahn v. Shevin, 416 U.S. 351 (1975)), *cert. denied,* 421 U.S. 929 (1976).

[82] See note 63 *supra.*

[83] See note 81 *supra.*

[84] For a discussion of the issue under the Equal Rights Amendment, see Kurtz, *The State Equal Rights Amendments and Their Impact on Domestic Relations Law,* 11 FAM. L.Q. 101, 128-35 (1977).

[85] In Conway v. Dana, 456 Pa. 536, 318 A.2d 324 (1974), the husband argued that with the passage of the state's equal rights amendment, the presumption that the father alone is responsible for support, without regard to the financial position of either parent, was no longer valid. The Pennsylvania Supreme Court agreed with his argument. 318 A.2d at 326.

[86] *Compare* White v. White, 226 Pa. Super. Ct. 499, 313 A.2d 776, 780 (1973) (relying on precedent without reference to equal rights amendment to hold that wife's earning power should be considered in fixing alimony) *with* Commonwealth *ex rel.* Lukens v. Lukens, 224 Pa. Super. Ct. 227, 303 A.2d 522, 523 (1973) (holding support laws do not violate state's equal rights amendment).

There is no doubt that the passage of some form of equal rights amendment in Mississippi would have long range effects on the present alimony procedure. The amendment would preclude the legislature from lending statutory support to gender based classifications in the domestic relations area. As regards the matter of alimony, the enactment of an equal rights amendment in Mississippi would cause the award to be based on such sexually neutral factors as present earnings, marketability of job skills, and education level. Consequently, the concept of alimony could be preserved and sexual stereotyping would be eliminated as a matter of law. At present, however, equal protection is the only weapon against gender based discrimination in Mississippi. Until the equal rights amendment is ratified, the astute attorney might use both arguments in a situation like *Taylor*[87] and possibly change the state's viewpoint of spousal support.

IV. CONCLUSION

Although the domestic relations cases[88] rendered by the 1977 Mississippi Supreme Court brought little change to the preexisting decisional law, the opinions signaled some perplexing issues that may be raised in future litigation. The possible solutions to these problems emanate from a constitutional framework and reflect modern trends and changes in societal attitudes. It is hoped that the practitioner and academician will seek to develop these arguments pertaining to the constitutional rights of minors and equal protection challenges to Mississippi's alimony statute. Until such theories are brought before the state courts, Mississippi law of domestic relations will remain static and the rights of many will be ignored.

Jimmie D. Marshall

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[87] For another 1977 decision dealing with alimony payments, see Hopton v. Hopton, 342 So. 2d 1298, 1300 (Miss. 1977) (award of $8400 per year reduced to $5400 because husband's income was only $12,000 per year).

[88] Smith v. Smith, 349 So. 2d 529, 531 (Miss. 1977) (award payments terminate upon death of husband absent written agreement to bind his estate); Fondren v. Batton, 348 So. 2d 431, 432 (Miss. 1977) (defendant must be notified by pleading before chancellor may award items not requested in complaint); Hodges v. Hodges, 346 So. 2d 903, 904 (Miss. 1977) (lien upon public retirement system to secure alimony payment prohibited by statute).

INSURANCE

Mississippi insurance law was not drastically changed by the Mississippi Supreme Court decisions[1] rendered during 1977. In a few noteworthy decisions, however, the court refined some existing standards and boldly created new ones. Whether the result of attitudinal changes within the court or the logical development of stare decisis, these decisions are analyzed in this commentary both for their precedential value and shortcomings. It is hoped that practitioners and students will benefit from the following interpretations of the 1977 court's decisions in the area of insurance.

I. MISREPRESENTATION AND CONCEALMENT IN LOSS INVESTIGATION

One provision in the standard fire insurance policy that has produced an inordinate amount of litigation has been the concealment clause.[2] These clauses usually require the insured to relate to the insurer, often under oath, answers to questions concerning the loss, its amount and its cause. In addition, concealment clauses generally provide that any fraud, concealment, or false swearing, willfully committed by the insured during the postloss interview, will relieve the insurer of liability under the insurance contract.[3] The fraudulent action of an employee, without the knowledge or consent of the employer, will not, however, necessarily afford the insurer such relief.[4] The courts, distinguishing these fraudulent situations from circumstances where an honest mistake has been made by the insured,[5] have held that an innocent overvaluation of the loss will not bar the insured's recovery.[6] Conversely, one who intentionally inflates the amount of loss will not be so fortunate.[7]

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[1] Some other decisions handed down during the last term are of lesser significance. *See* Nelson v. Home Ins. Co., 353 So. 2d 763, 765-66 (Miss. 1977) (where policy covered loss only if insured could prove actual cash value at the time of the loss, insured should have been allowed to reopen case to prove value); New Hampshire Ins. Co. v. Robertson, 352 So. 2d 1307, 1311 (Miss. 1977) (policy excluding coverage of loss from underground water narrowly construed to apply only to water resulting from natural causes); Herbert v. Pace, 351 So. 2d 529, 530 (Miss. 1977) (where policyowner changed beneficiary from wife to daughter and subsequently assigned the policy to his wife, the assignment vested her with all right, title and interest to the exclusion of the daughter); Ross v. Crane Co., 350 So. 2d 697, 699 (Miss. 1977) (where insured delayed over six years in bringing notice of his employment related accident, insurer could avoid liability since insured had been informed of policy and since the statute of limitations had expired); Pennsylvania Life Ins. Co. v. Howell, 346 So. 2d 368, 370 (Miss. 1977) (insured was totally disabled but not confined so recovery should be limited to disability benefits for 12 months of nonconfining sickness); Thompson v. Commercial Ins. Co., 344 So. 2d 135, 137 (Miss. 1977) (preexisting illness could not bar recovery unless a distinct symptom of the illness was accurately diagnosed prior to the issuance of the policy); Stonewall Ins. Co. v. Prather, 343 So. 2d 463, 464 (Miss. 1977) (where policy required unmarried insured to own an automobile in order to be covered while operating another vehicle, the son of the named insured, who owned no automobile, was not covered while driving another individual's auto).

[2] The usual form for this clause is as follows:

> This entire policy shall be void if, whether before or after a loss, the insured has willfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

R. KEETON, BASIC TEXT ON INSURANCE LAW 595 app. (1971).

In order to constitute the requisite fraud or false swearing sufficient to bar recovery, the statements must be willfully made,[8] concern material facts,[9] and be made with an intent to deceive the insurer.[10] In an early pronouncement,[11] the Mississippi judiciary reasoned that when the insured knowingly made false statements and overvaluations under examination subsequent to the loss, the intent to deceive would be implied.[12] This abbreviated test was utilized by the court last year in *Edmiston v. Schellenger,*[13] where it was held that the materiality of false statements should be judged at the time the statements were made and that, where such statements are knowingly and willfully made, the insurer need not offer proof to establish the insured's fraudulent intent.[14]

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[3] *See, e.g.,* Chaflin v. Commonwealth Ins. Co., 110 U.S. 81, 97 (1883) (gross overvaluation of goods destroyed in fire).

[4] *See, e.g.,* Charles Stores, Inc. v. Aetna Ins. Co., 428 F.2d 989, 992 (5th Cir. 1970) (vice-president of corporation may have set fire to store).

[5] *See, e.g.,* West v. Green, 284 Ala. 517, 226 So. 2d 302, 306 (1969) (whether mistake was honest is question for jury). *See also* 5A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 3587, at 590-91 (1970 & Supp. 1978).

[6] L. & S. Enterprises Co. v. Great Am. Ins. Co., 454 F.2d 457, 460 (7th Cir. 1971) (insured overestimated by $900.00 on a $31,958.99 claim, held to be unintentional); Mississippi Fire Ins. Co. v. Dixon, 133 Miss. 570, 584, 98 So. 101, 104 (1923) (insured estimated claim to be $700.00 but loss was only $200.00, overvaluation held made in good faith).

[7] *See* Claxton v. Fidelity & Guar. Fire Corp., 179 Miss. 556, 564-66, 175 So. 210, 211-12 (1937) (insured claimed $2000 worth of personalty destroyed in fire while insurance coverage was only $1000).

[8] *See* Commercial Cas. Ins. Co. v. Holmes, 206 S.W.2d 882, 884 (Tex. Ct. App. 1948) (" 'False swearing' is the deliberate and willful making, under oath, of a false statement by a voluntary declaration or affidavit . . . .").

[9] The Mississippi court has held that it will take a broad view of what constitutes materiality. This holding is based essentially on a recognition of the insurer's need to have access to accurate information concerning any claim of loss. Standard Ins. Co. v. Anderson, 227 Miss. 397, 407, 86 So. 2d 298, 301-02 (1956); *accord,* Taylor v. Fireman's Fund Ins. Co., 306 So. 2d 638, 643-44 (Miss. 1975) (insured required to answer questions about cause of fire "fully and completely, to give the best information he had about these matters").

[10] Chaflin v. Commonwealth Ins. Co., 110 U.S. 81, 95 (1883). *But see* 5A J. APPLEMAN, *supra* note 5, at 596-97 (not all states require that there be an intent to deceive or defraud the insurer).

[11] Claxton v. Fidelity & Guar. Fire Corp., 179 Miss. 556, 175 So. 210 (1937).

[12] *Id.* at 566, 175 So. at 212.

[13] 343 So. 2d 465 (Miss. 1977).

In *Schellenger,* the insured made a claim for fire loss under a policy with Missouri General Insurance Company. During an interview with the insurer's adjuster and a subsequent examination under oath, the insured made certain statements concerning his activities on the day of the loss and the presence of out-of-state visitors at his home prior to the fire. He refused, however, to sign a copy of the deposition which admittedly contained certain factual inaccuracies. In a corrected deposition, however, the insured demonstrated that he had made false statements in the earlier deposition.[15] In the subsequent suit by the insured based on the insurer's refusal to pay the claim, the trial court removed the case from the jury, overruling the defendant-insurer's plea in bar. In a judgment awarding the insured the full value of the policy, the trial court found that the insured's statements, regardless of their falsity, did not concern any fact material to the insurer's investigation of the loss. The supreme court disagreed, finding that the false information given by the insured was material.[16] Recognizing that the purpose of concealment clauses is to protect the insurer against false claims by compelling divulgence of all pertinent information, the court reasoned that anyone with knowledge of the possible causes of the blaze had relevant testimony.[17] The insured contended that any false statements were now immaterial since the insurer did not raise the defense of arson. The court rejected this argument and held that the issue of materiality should be judged at the time the misrepresentations took place—the postloss deposition—not at the time of the trial.[18] It would hardly be just to allow a claimant who misrepresents material facts upon which the insurer might base a later defense to then avoid the penalties of the misrepresentation because the insurer was unable to establish the defense.

The *Schellenger* court, relying on precedent,[19] reaffirmed the proposition that when false statements material to the insurer's loss investigation are willfully made, the intent to deceive is implied.[20] The cause was, therefore, reversed and rendered for the insurer.

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[14] *Id.* at 467.

[15] In his original deposition, the insured stated that he had never before had any sort of fire loss and that he was confined in a hospital on the day of the loss and had not received any visitors in the home that day. In his subsequent corrected statement he admitted his former home in Illinois had burned in 1971 and that he had left the hospital on the day in question to prepare the home for a visit by the daughter and exwife. *Id.* at 466.

[16] *Id.* at 467.

[17] *Id.*

[18] *Id.*

[19] See notes 11 & 12 and accompanying text *supra.*

[20] Edmiston v. Schellenger, 343 So. 2d 465, 467 (Miss. 1977).

Although exhibiting no original reasoning, *Schellenger* embodies a definitive interpretation of concealment provisions and produces a concise rule in Mississippi concerning the burden borne by insurance carriers attempting to avoid liability for reason of an insured's fraudulent misrepresentations. A stricter interpretation of such clauses would place a heavy burden on insurers attempting to prove materiality, and the insured's intent to deceive would often be impossible to prove. Aligning Mississippi with most states,[21] the *Schellenger* court has made it possible for insurers to avoid fraudulent claims but has also preserved the basic checks needed in a situation where the parties meet in relatively unequal bargaining positions.

II. PUNITIVE DAMAGES FOR WRONGFUL REFUSAL OF FIRST PARTY CLAIMS

Any agreement between an insurer and the insured is essentially a contract to indemnify.[22] For this reason contract principles most often govern insurance litigation and insurance remedies. In most breach of contract situations, the injured party's remedy is limited to those damages that are reasonably within the contemplation of the contracting parties.[23] Similarly, the remedies available to the insured upon the breach of the insurer are often limited to recovery of the amount of the debt due under the policy plus interest.[24] Punitive damages for breach of an insurance contract are generally not recoverable.[25] Thus, under present recovery limitations, insurers often find it advantageous to refuse payment of legitimate claims or to delay acknowledgement of liability.[27] There is, however, a growing trend in some jurisdictions viewing strict adherence to this old rule as inadequate,[26] and some courts now permit recovery of punitive damages for such action on the part of the insurer.[28] An award of punitive damages under these circumstances is based upon the logic that the insurer's willful refusal to pay, without good cause, amounts to a tortious breach of contract.[29]

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[21] *See, e.g.*, Chaflin v. Commonwealth Ins. Co., 110 U.S. 81, 95 (1883) (gross overvaluation of dry goods destroyed by fire in warehouse); American Diver's Supply & Mfg. Corp. v. Bolt, 482 F.2d 795, 796 (10th Cir. 1973) (claim for undamaged inventory moved from scene of fire to another warehouse); Atlas Assurance Co. v. Hurst, 11 F.2d 250, 251 (8th Cir. 1926) (alleged false swearing by insured as to cause of explosion); Singleton v. Hartford Fire Ins. Co., 127 Cal. App. 635, 16 P.2d 293, 298-99 (1932) (false swearing by insured as to value of property and arson). *But see* Castoldi v. Hartford County Mut. Fire Ins. Co., 21 Conn. Supp. 265, 154 A.2d 247, 250 (1959) (intent to deceive must be proved by "clear and convincing" evidence); National Fire Ins. Co. v. Itasca Lumber Co., 148 Minn. 170, 181 N.W. 337, 339 (1921) (false swearing is a jury question); Mulkey v. U.S.F. & G. Co., 243 S.C. 121, 132 S.E.2d 278, 281-82 (1963) (no avoidance of liability where claim made on items which may have been insured).

[22] 12 J. APPLEMAN, *supra* note 5, § 7001, at 3 (1943 & Supp. 1978).

[23] This principle takes as its foundation the historic case of Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854). It is considered the rule in nearly all jurisdictions. 5 A. CORBIN, CONTRACTS § 1007 (1964 & Supp. 1971).

[24] New Orleans Ins. Co. v. Piaggio, 83 U.S. (16 Wall.) 378, 386 (1872). *See generally* Comment, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims—an Emerging Trend,* 45 FORDHAM L. REV. 164, 168-69 (1976-77).

[25] *Cf.* St. Paul at Chase Corp. v. Manufacturer's Life Ins. Co., 262 Md. 192, 278 A.2d 12, 33-35 (no punitive damages for breach of contract to loan money where no malice shown), *cert. denied,* 404 U.S. 857 (1971); White v. Benkowski, 37 Wis. 2d 285, 155 N.W.2d 74, 77-78 (1967) (no punitive damages for breach of contract to supply water even if breach

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was willful, but breach of a contractual duty may be a tort). Consequential damages are available, however, upon proof that the damages incurred were reasonably within the contemplation of the parties. *See, e.g.*, Reichert v. General Ins. Co. of America, 428 P.2d 860, 864, 59 Cal. Rptr. 724, 728 (1967) (fire insurance companies chargeable with knowledge that improper delay in payment may result in insured's suffering the very injuries he sought to be protected against by purchasing the policies).

The first party claim for excess damages should be distinguished from third party claims where the insurer wrongfully refuses to settle a claim. These excess damages are usually recoverable by the first party. *See, e.g.*, Martin v. Traveler's Indem. Co., 450 F.2d 542, 551 (5th Cir. 1971) (in Mississippi, an insurer cannot be liable in excess of its policy limits for failing to settle unless its refusal to settle amounts to fraud); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 176-77, 58 Cal. Rptr. 13, 16-17 (1967) (breach of contract to defend insured held to be a tort).

[26] The development of the trend began in California where the courts have held that for the privilege of pursuing its own economic interests, the insurance companies must show a good faith belief in the rights they assert under their contracts. *See, e.g.*, Silberg v. California Life Ins. Co., 521 P.2d 1103, 1109, 113 Cal. Rptr. 711 (1974) (insurer must give interests of insured as much consideration as it gives its own interests). *See generally* Thornton & Blaut, *Bad Faith and Insurers: Compensatory and Punitive Damages*, 12 FORUM 699, 702 (1976-77). At present, the Florida courts take a diametrically opposing view. *See* Kurz v. New York Life Ins. Co., 181 So. 2d 537, 539 (Fla. Dist. Ct. App. 1966) (wrongful refusal by insurer to pay beneficiary will subject insurer only to payment of beneficiary's attorneys' fees, not punitive damages). All 48 other jurisdictions fall somewhere in between the California and Florida views. Thornton & Blaut, *supra* at 702.

[27] This is solely a matter of economics. If the insurer refuses to settle, the only risk he runs is that of being held liable for the amount of the policy coverage, an amount he would have to pay anyway, plus interest. Commercial interest rates, being higher than their legal counterparts, make it advantageous to delay payment and maintain the proceeds as long as possible. 13 WAKE FOREST L. REV. 685, 685-86 (1977).

[28] *See, e.g.*, Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 1037, 108 Cal. Rptr. 480, 485 (1973) (where insurer fails to deal with insured in good faith by refusing to pay a legitimate claim, insured has cause of action for breach of implied covenant of good faith); Vernon Fire & Cas. Ins. Co. v. Sharp, 264 Ind. 599, 349 N.E.2d 173, 180 (1976) (same); Kirk v. Safeco Ins. Co., 28 Ohio Misc. 44, 273 N.E.2d 919, 921 (1970) (breach of insurance contract amounted to a willful, wanton and malicious tort). *But see* Bolden v. John Hancock Mut. Life Ins. Co., 422 F. Supp. 28, 29 (E.D. Mich. 1976) (distinguished cases allowing for punitive damages in their finding of tortious conduct in addition to breach of contract).

[29] *See, e.g.,* Carter v. Hartford Accident & Indem. Co., 423 F. Supp. 827, 830 (E.D. Va. 1976) (alleged willful refusal to make payments under policy); Escambia Treating Co. v. Aetna Cas. & Sur. Co., 421 F. Supp. 1367, 1370-71 (N.D. Fla. 1976) (refusal to pay claim

For many years, the settled rule in Mississippi has been that in suits based upon breach of contract, punitive damages are not properly recoverable unless the attending breach is of such a magnitude as to amount to a separate and independent tort.[30] In a 1975 case,[31] the Mississippi Supreme Court extended this rationale to instances of alleged breaches of insurance contracts, stating that unless "such breach is attended by intentional wrong, insult, abuse, or such gross negligence as to consist of an independent tort," punitive damages would be improper.[32]

During 1977, the supreme court heard two cases whose factual bases for punitive damages were substantially similar. The court delivered opposite holdings, while maintaining the settled rationale. Accordingly, at the end of the year, the court left confusing precedent in this area and no guidance as to its eventual movement.

In *Lincoln National Life Insurance Co. v. Crews,*[33] the insurer refused to pay a claim submitted under the insured's group health policy. The insurer contended, and the evidence was undisputed, that the insured failed to submit a proof of loss statement within the period required under the contract. There was evidence, however, which showed the insurer's waiver of the limitation.[34] Relying on this waiver, the jury

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must be unreasonable and in bad faith to recover punitive damages from insurer); Progressive Cas. Ins. Co. v. Keys, 317 So. 2d 396, 398 (Miss. 1975) (no punitive damages for breach of contract unless breach was "attended by intentional wrong, insult, abuse or such gross negligence as to consist of an independent tort"); Curtiss v. Aetna Ins. Co., 90 N.M. 105, 560 P.2d 169, 172-73 (1976) (punitive damages awarded where insurer willfully and wantonly refused to pay valid claim on health insurance policy). *See generally* Parks & Heil, *The Tort of "Bad Faith"—the Impact of Gruenberg v. Aetna Insurance Company,* 24 FED'N OF INS. COUNSEL Q. 35 (1973).

[30] *See* Mid South Cotton Growers Ass'n v. Woods, 380 F. Supp. 429, 431 (N.D. Miss. 1974) (alleged intentional breach of contract to deliver cotton); D.L. Fair Lumber Co. v. Weems, 196 Miss. 201, 221-22, 16 So. 2d 770, 773 (1944) (destruction of lessor's fence by lessee without making repairs as lease contract required amounted to independent tort); American Ry. Express v. Bailey, 142 Miss. 622, 630-31, 107 So. 761, 763 (1926) (mere negligence in cabling Mexican rather than American money to plaintiff stranded in China did not warrant recovery of punitive damages); Hood v. Moffett, 109 Miss. 757, 764-65, 69 So. 664, 666 (1915) (no independent tort committed where physician failed to attend woman in labor whose husband had contracted with him to deliver the baby).

[31] Progressive Cas. Ins. Co. v. Keys, 317 So. 2d 396 (Miss. 1975). In *Keys,* the insured attempted to combine a suit for breach of contract and a suit for a tort, the failure of the insurer to honor a settlement provision. The court, finding that the separate suit for tort was incorrectly combined with the suit on the contract, held that in a suit based upon the breach of the insurance contract, the same rules applying to all actions seeking punitive damages should apply. *Id.* at 398.

[32] *Id.*

[33] 341 So. 2d 1321 (Miss. 1977).

[34] Under the terms of the policy, proof of loss was to be submitted to the insurer within 90 days. After the policy had lapsed for nonpayment of premiums, the company unilater-

rendered a verdict for the amount of coverage plus $2,308.28 in punitive damages.[35] On appeal, the supreme court affirmed the judgment as to the actual damages proved under the policy, but refused to award punitive damages without the requisite showing of "intentional wrong, insult, abuse or gross negligence." The court stated:

> There is nothing in the record capable of supporting a finding that Lincoln, in defending the suit and relying upon the provisions of the policy, acted in other than good faith. The mere fact that Lincoln rejected the claims under the provisions of its policy and defended the suit and lost does not justify imposition of punitive damages.[36]

Only nine months later, the court refused to follow the holding in *Crews.* In *Standard Life Insurance Co. v. Veal,*[37] the insured, pursuant to a loan agreement undertaken with a finance company, entered into a contract with the insurer for credit life insurance on the debt. Under the terms of the policy, it was clear that the language defining the "insured" included both the principal obligor and his spouse by marriage.[38] Upon the death of his wife, the insured, in accordance with the terms of the policy, made a claim with the insurer. Refusing to honor the claim, the company contended that since the decedent's spouse's name did not appear on the note, there was no debtor-creditor relationship and therefore, no insurable interest.[39] At trial, the jury awarded the plaintiff-insured $1,008.00 actual damages[40] and $25,000.00 punitive damages.

Although the insurer's initial contention was not raised on appeal, other grounds for refusing the claim were put forth and uniformly rejected as not being meritorious.[41] The *Veal* court found the insurer's refusal to honor the claim on what it termed "a reason clearly contrary to the express provisions of its own policy"[42] to be particularly indicative of bad faith. Any other holding, the court felt, would allow the insurance

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ally extended this period for another 90 days. The insured's medical bills, however, were not submitted to the insurer until well after the total 180 day period had expired. *Id.*

[35] *Id.*

[36] *Id.* The fact that the record here did not present a case for punitive damages will become important in analyzing the subsequent decision in Standard Life Ins. Co. v. Veal, 354 So. 2d 239 (Miss. 1977).

[37] 354 So. 2d 239 (Miss. 1977).

[38] The policy defined the "insured obligor" as "the principal or first signatory on a contract of indebtedness and his or her spouse by marriage not dissolved by a divorce or legal separation at the inception of the debt." *Id.* at 241.

[39] *Id.* at 242-43.

[40] The stated coverage of the policy was the existing amount of the debt. At the time of the decedent's death, the debt totaled $1,008.00. *Id.* at 240-41.

[41] See note 178 and accompanying text *infra.*

[42] 354 So. 2d at 248.

company to refuse payment of a legitimate claim with impunity. The insurer would be able to pressure the insured to accept an inadequate settlement or avoid payment entirely if it had no fear that the claimant's ultimate recovery would exceed the policy maximum plus interest. Accordingly, the *Veal* majority found that the insurer's refusal to pay the legitimate claim was "an intentional wrong and constituted an independent tort."[43]

In a forceful dissent,[44] Justice Smith characterized the majority holding as the imposition of unconstitutional punishment upon one who, in good faith, defended its interpretation of a contractual agreement subject to differing interpretations.[45] Although the insurer did not prevail, Justice Smith insisted that the assessment of punitive damages against an insurer who denies liability and defends the action would cause future insurers to suffer punitive damages by the mere failure to prove their positions.[46] Moreover, such assessments would tend to drive the prices of badly needed credit life insurance up to an exorbitant level, to the economic detriment of wage earners.[47]

Although the majority opinion in *Veal* never drew a parallel between its holding and that of other jurisdictions, it is apparent that the court recognized the developing trend toward using punitive damages to coerce good faith performance from insurers.[48] The size of the judgment awarded suggests an exemplary intent on the court's part to prevent insurers from dishonoring legitimate claims. This is also suggested in the court's unusually detailed opinion on this point.[49] Of course, it

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[43] *Id.*

[44] Interestingly, Justice Smith authored the majority opinion in *Crews* in which Justice Sugg concurred. Justice Sugg, in turn, wrote the controlling opinion in the instant case. Justices Patterson, Walker and Lee joined in the plurality opinion. Justice Smith was joined in his dissent by Justices Inzer, Robertson and Broom. Justice Bowling took no part in the decision. The result is, therefore, a precarious 4-4 decision.

[45] Section 25 of article 3 of the Mississippi constitution provides that "[n]o person shall be debarred from prosecuting or defending any civil cause for or against him or herself, before any tribunal in the state, by him or herself, or counsel, or both." MISS. CONST. art. 3, § 25. Justice Smith cited this section for the proposition that insurers are entitled to defend a civil action without exposure to punishment by the assessment of punitive damages for not prevailing. 354 So. 2d at 252 (Smith, J., dissenting).

[46] 354 So. 2d at 253.

[47] *Id.* at 251.

[48] See notes 24 through 26 and accompanying text *supra.*

[49] The language of the opinion itself, as well as the numerous decisions quoted by the court, also lead to this conclusion. 354 So. 2d at 247; *see* Snowden v. Osborne, 269 So. 2d 858 (Miss. 1972), in which the court stated:

> Exemplary or punitive damages are those, of course, which are in addition to the actual or compensatory settlement. They are granted in the nature of punishment for the wrongdoing of the defendant and as an example so that others may be deterred from the commission of similar offenses thereby in theory

remains to be seen whether the court intends *Veal* to serve merely as an initial warning or as an open attack on unscrupulous insurance companies whose refusal to honor claims is based on economic self-interest rather than on conscientious defenses.

A sensitive analysis of the court's holding in *Crews* applied in the factual context of *Veal* would hardly justify a finding of bad faith sufficient for a $25,000.00 judgment. Indeed, the divergence between the holdings of *Crews* and *Veal* is inexplicable in the face of their almost indistinguishable factual bases. In *Crews* the insurer rejected the claim of the insured, choosing to defend the subsequent suit, which it lost. Likewise, the insurer in *Veal* rejected the claim of the insured, defended the subsequent suit and lost. Yet, in *Crews* the record did not sustain a finding of bad faith, while in *Veal* it supported such a finding. It is not only apparent that the two decisions cannot be factually distinguished,[50] but also obvious that the cases evolved from the same legal matrix.[51] The "intentional wrong—independent tort" test[52] is applied by the court in *Crews* and *Veal*. The result is the announcement of a concise rule without adequate guidelines for its practical application.

III. CHANGE OF BENEFICIARY—PRESUMPTION OF UNDUE INFLUENCE

In a 1971 decision,[53] the Mississippi judiciary mandated that in order to set aside a will on the basis of undue influence, the contestant must show that the one alleged to have exercised such influence did so to overcome the "free and unrestrained will of the testator so as to control his acts and prevent him from being a free agent."[54] Often a presumption of undue influence arises merely from the nature of the relationship existing between the testator and his intended beneficiary,[55] in which case the burden of proving the testator's free will and testamentary capacity shifts to the proponent of the instrument.[56] In some

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protecting the public.

Id. at 860.

[50] A tenuous, but perhaps arguable, point of distinction is the insurer's rejection of the plaintiff's claim in *Veal* in spite of what appeared to be the clear wording of the controlling policy provision. Although the opinion points to this as an act of bad faith, the argument was not raised on appeal and the question remains, in light of *Crews*, whether this constituted a sincere defense based upon the terms of the policy.

[51] See notes 30 & 31 and accompanying text *supra.*

[52] See notes 31, 32 & 43 and accompanying text *supra.*

[53] Genna v. Harrington, 254 So. 2d 525 (Miss. 1971).

[54] *Id.* at 529; *accord,* Barnett v. Barnett, 155 Miss. 449, 457, 124 So. 498, 500 (1929) ("Undue influence in the matter of executing a will must be the substitution of another's will for the will of the testator.").

[55] Estate of Bilello v. Bilello, 317 So. 2d 916, 918 (Miss. 1975) (brother and sister); *In re* Will of Moses, 227 So. 2d 829, 833 (Miss. 1969) (attorney and client).

[56] Bearden v. Gibson, 215 Miss. 218, 219, 60 So. 2d 655, 656 (1952); O'Bannon v.

jurisdictions, the presumption is raised where the evidence reveals that a romantic interest existed between the testator and the beneficiary.[57] Several jurisdictions, applying these principles to insurance contracts, have ruled that when the owner of an insurance policy decides to change his beneficiary, the intended beneficiary must often shoulder the burden of disproving undue influence.[58] A minority of jurisdictions holds that the mere existence of an illicit affair between the policy holder and the new beneficiary raises a prima facie presumption that the insured's change in beneficiary was procured through undue influence.[59] Under this view, therefore, the attempted change will be held ineffective. Conversely, the overwhelming majority of jurisdictions hold that the "affection for a paramour is not probative evidence of undue influence."[60]

Last year, in a case of first impression upon this point, the Mississippi Supreme Court rejected the minority view, holding that a meretricious relationship between the insured and his beneficiary is not sufficient to shift the burden of proof to the beneficiary and raise a prima facie presumption of undue influence. In *Smith v. Hinton,*[61] the insured purchased an insurance policy from Mutual Life Insurance Co. of New York (MONY), naming his wife and children as beneficiaries. Four years later, the insured changed the beneficiary to Mrs. Hinton, designating his estate as contingent beneficiary. Although not reported, the evidence apparently demonstrated an extended romantic relationship between

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Henrich, 191 Miss. 815, 821, 4 So. 2d 208, 209 (1941); *cf.* Croft v. Adler, 237 Miss. 713, 727, 115 So. 2d 683, 688 (1959) (burden rests on proponent even where no presumption arises).

[57] Benner v. Pedersen, 143 So. 2d 722, 724 (Fla. Dist. Ct. App. 1962); Beatty v. Strickland, 136 Fla. 330, 186 So. 542, 544 (1939); *cf. In re* Will of Moses, 227 So. 2d 829, 833 (Miss. 1969) (existing confidential relationship between testatrix and attorney-beneficiary was further enhanced by their romantic interest). *Contra,* O'Bannon v. Henrich, 191 Miss. 815, 822-23, 4 So. 2d 208, 209-10 (1941) (romantic interest alone will not justify drawing of presumption absent evidence of the beneficiary's participation in the will's preparation or an unnatural disposition of the estate).

[58] *See, e.g.*, Lyle v. Bentley, 406 F.2d 325, 330 (5th Cir. 1969) (applying Texas law); Goodale v. Wilson, 134 Me. 358, 186 A. 876, 877 (1936); *see* 2A J. APPLEMAN, INSURANCE LAW AND PRACTICE § 1025, at 62 (1966 & Supp. 1978) (insured must be shown to be deprived of his free agency to prove undue influence in change of beneficiaries).

[59] *See* Benner v. Pedersen, 143 So. 2d 722, 724, 726-27 (Fla. Dist. Ct. App. 1962) (insured changed beneficiary from wife to mistress).

[60] Lyle v. Bentley, 406 F.2d 325, 330 (5th Cir. 1969); *accord,* Tracy v. Prudential Ins. Co. of America, 34 Del. Ch. 207, 101 A.2d 321, 328 (1953) (mere existence of meretricious relationship between insured and beneficiary does not raise presumption of undue influence); New York Life Ins. Co. v. Andrews, 167 Ill. App. 182, 186 (1912) (unlawful cohabitation between insured and beneficiary not sufficient evidence from which jury could infer undue influence); Metropolitan Life Ins. Co. v. Gray, 290 Mich. 441, 287 N.W. 441, 443 (1939) (same).

[61] 349 So. 2d 510 (Miss. 1977).

Mrs. Hinton and the insured.[62]

Upon the death of the insured, his widow brought suit against Mrs. Hinton and MONY alleging Mrs. Hinton's undue influence upon the insured in the procurement of the change of beneficiary and asserting her position as its designated beneficiary and the rightful owner of its benefits.[63] The chancellor, rejecting this contention, entered judgment for Mrs. Hinton as the true beneficiary. On appeal, the Mississippi Supreme Court declined to accept the minority view urged by the appellant and affirmed the chancellor's finding that no evidence of undue influence was presented.[64]

The decision in *Smith* is noteworthy for two reasons. First, *Smith* is a case of first impression upon this point and places Mississippi alongside the solid majority of other states.[65] Second, the language of the opinion negates earlier indications that Mississippi favored the minority view,[66] and implicitly adopts the more enlightened view, which bases the determination of the burden of undue influence upon a careful examination of the merits and facts of each case.[67] This approach is clearly preferable to the minority view which places an arbitrary and onerous burden on beneficiaries by effectively empowering a court to impose its own moral precepts upon the insured.[68] The *Smith* court apparently intends to preserve a degree of flexibility in analyzing the evidence presented in a particular case. In viewing each case on its merits, the court retains the ability to shift the burden of proof to the beneficiary when the facts indicate the existence of a romantic relationship sufficient to constitute undue influence.

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[62] *Id.* at 511.

[63] Mrs. Smith also contended that the policy had been transferred to her by inter vivos gift prior to the change of beneficiary. Relying on Stepson v. Brand, 213 Miss. 826, 835, 58 So. 2d 18, 21 (1952), which had previously settled the question, the court held that such gifts are valid provided all of the essentials of a gift are present. The court also reversed the trial court's refusal to hear any evidence on this point. The chancellor had ruled that such evidence would have been in derogation of MISS. CODE ANN. § 13-1-7 (1972), the Dead Man's Statute. On appeal, the supreme court held that in order for that section to be applicable there must be a claim which affects the decedent's estate directly. 349 So. 2d at 512. In the instant case, no matter which litigant prevailed, the estate of the deceased would not be directly affected. Had Mrs. Smith, the decedent's widow, prevailed, the inter vivos gift would have left the husband's estate with no claim to the proceeds of the policy. Since Mrs. Hinton, the mistress, prevailed, under the terms of the policy, she was entitled to all the proceeds. 349 So. 2d at 512.

[64] 349 So. 2d at 512. In addition to refusing to find a presumption of undue influence arising out of the beneficiary's relationship with the insured, the court found no evidence to indicate that Mrs. Hinton had participated in making the change or that her influence or will had been so exercised upon him as to replace his free will. *Id.*

[65] See note 60 and accompanying text *supra.*

[66] *See In re* Will of Moses, 227 So. 2d 829, 833 (Miss. 1969) (strong evidence indicating an intimate affair between the testatrix and her beneficiary found to be an important probative factor).

[67] *See* Goodale v. Wilson, 134 Me. 358, 186 A. 876, 880 (1936) (citing general rule that the mere existence of illicit relations between the insured and the new beneficiary is not sufficient to raise the presumption that the change was because of undue influence).

[68] *See* Lyle v. Bentley, 406 F.2d 325, 330 (5th Cir. 1967) (courts have no power "to impose their own moral standards or familial preferences upon litigants and to derive from them a test of undue influence").

IV. UNINSURED MOTORIST COVERAGE

In Mississippi, as in most jurisdictions, it is statutorily required that persons operating motor vehicles on the state's highways be able to bear the financial responsibility for injuries sustained as a result of an auto accident.[69] While the intended effect of these financial responsibility laws was to require liability insurance on operators, in practice it immediately became apparent that there was a major defect in the legislation. The uninsured and usually judgment-proof defendant was not subject to the statutory sanctions until after an accident.[70] There was no penalty for failure to obtain liability coverage prior to a claim.[71] In response to the many uncompensated personal injuries resulting from this defect, Mississippi, like most other states,[72] enacted into law the requirement for uninsured motorist coverage.[73]

The basic rationale which underlies uninsured motorist coverage (UM) is an attempt to put the motorist who is injured by a negligent uninsured operator in the same position he would have been in had the negligent operator carried at least the statutory minimum of liability insurance.[74] In practice, the coverage is offered by the insurer under a mandatory endorsement appended to the liability policy[75] and for which a separate premium is paid. When the insured has suffered loss or injury at the hands of a negligent and uninsured driver, he merely makes a claim with his insurer for the amount of any judgment he would have been able to obtain had the negligent driver been insured.[76]

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[69] MISS. CODE ANN. §§ 63-15-1 to -75 (1972).

[70] *Id.* § 63-15-11 (Supp. 1977), provides, *inter alia:*

> 1) If twenty (20) days after the receipt of a report of a motor vehicle accident within this state which has resulted in bodily injury or death, or damage to the property of any one (1) person in excess of one hundred dollars ($100.00), the department does not have on file evidence satisfactory to it that the person who would otherwise be required to file security under subsection (2) of this section has been finally adjudicated not to be liable, or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments with respect to all claims for injuries or damages resulting from the accident . . . .
>
> 2) The department shall, within sixty (60) days after the receipt of such report of a motor vehicle accident, suspend the license of each operator . . . .

See generally Note, *Stacked Recovery Under the Uninsured Motorist Endorsement of the Automobile Liability Policy,* 9 VAL. U.L. REV. 135, 136 (1975).

[71] MISS. CODE ANN. § 63-15-11 (Supp. 1977).

[72] *See* Widiss, *Perspectives on Uninsured Motorist Coverage,* 62 NW. U.L. REV. 497, 499 n. 10 (1967) (listing 42 states which now require or will require this type of coverage).

[73] MISS. CODE ANN. § 83-11-101 (Supp. 1977), provides, *inter alia:*

> No automobile liability insurance policy or contract shall be issued or delivered after January 1, 1967, unless it contains an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle, within limits which shall be no less than those set forth in the Mississippi Motor Vehicle Safety Responsibility Law . . . .

A. *"Stacking" or Aggregation of Claims*

Since insurers are only required to offer UM coverage for the minimum amount required by the state's financial responsibility laws,[77] the coverage often will not pay the entire amount of the judgment against the uninsured operator. To compensate for the deficit left when the judgment or claim of the insured exceeds the statutorily required coverage, the practice of "stacking" or aggregating coverages developed.[78] If the insured maintained coverage on more than one vehicle, either in separate policies, each containing a UM endorsement, or in a single policy with separate endorsements and separate premiums for each vehicle, then each coverage could be "stacked" upon the other until a total coverage amount was reached, or the full judgment was satisfied.[79]

Judicial approval and recognition of this practice has varied.[80] Refusal of the courts and insurers to allow "stacking" has been premised upon strict interpretation of "other insurance"[81] clauses and "limits of liability"[82] clauses, the latter being most often applicable in intra-policy stacking.[83] Conversely, some jurisdictions have found justification for

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[74] Note, *supra* note 70, at 137.

[75] Miss. Code Ann. § 83-11-101 (Supp. 1977).

[76] A federal district court has interpreted § 83-11-101 to require that an insured must obtain a valid judgment against the uninsured driver prior to bringing any action directly against the insurer. This would not, the court reasoned, work a hardship on the insured since once the judgment against the uninsured driver is recovered he need only show proof that the UM coverage was in existence in order to recover from the insurer. Logan v. Aetna Cas. & Sur. Co., 309 F. Supp. 402, 405 (S.D. Miss. 1970). *Contra,* Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456, 461 (Miss. 1971) (insured need only establish the legal liability of uninsured motorist which may be accomplished in action against insurer). *See generally* Miss. Code Ann. § 83-11-101 (Supp. 1977).

[77] A. Widiss, A Guide to Uninsured Motorist Coverage § 3.7, at 136-37 (1969 & Supp. 1976). Most insurers will offer only the absolute minimum required regardless of statutory language which would seem to leave the maximum coverage that could be offered unrestricted. *Id. See generally* Miss. Code Ann. § 83-11-101 (Supp. 1977).

[78] Davis, *Uninsured Motorist Coverage: Some Significant Problems and Developments,* 42 Mo. L. Rev. 1, 17 (1977).

[79] An excellent description of the mechanics of stacking can be found in Note, *supra* note 70, at 138-39. For further explanation, see Southern Farm Bureau Cas. Ins. Co. v. Roberts, 323 So. 2d 536, 537-39 (Miss. 1975).

[80] *See* Note, *supra* note 70, at 139-65.

[81] *See, e.g.,* Chandler v. Government Employees Ins. Co., 342 F.2d 420, 421 (5th Cir.

1965) (statute requiring UM coverage did not make inapplicable "other insurance" provision); Transportation Ins. Co. v. Wade, 106 Ariz. 269, 475 P.2d 253, 258 (1970) (upheld insurer's refusal to pay plaintiff's claim on decedent's personal policy after he had recovered full amount of UM coverage under policy of decedent's host); Harris v. Southern Farm Bureau Cas. Co., 247 Ark. 961, 448 S.W.2d 652, 654 (1970) (to allow stacking would be to contravene the express terms of the contract upon which the parties agreed); Morelock v. Millers' Mut. Ins. Ass'n, 49 Ill. 2d 234, 274 N.E.2d 1, 3 (1971) (under applicable "other insurance" clause insurer was liable only on one of the two policies under which plaintiff was covered). These jurisdictions are in a decided minority. *See* Neighbor, *Pyramiding Uninsured Motorist Coverage—has Iowa Joined The Majority?*, 23 DRAKE L. REV. 746, 763 (1974) (the majority view is that the "other insurance" clause is contrary both to public policy and to the traditional rules of construction of insurance contracts). In addition, one of the most noted commentators in the area has condemned such clauses as inequitable. A. WIDISS, *supra* note 77, § 2.59 at 108-09.

The standard "other insurance" clause provides:

> With respect to bodily injury to an insured while occupying a highway vehicle not owned by the named insured, this insurance shall apply only as excess insurance over any other similar insurance available to such insured and applicable to such vehicle as primary insurance, and this insurance shall then apply only in the amount by which the limit of liability for this coverage exceeds the applicable limit of liability of such other insurance.
>
> Except as provided in the foregoing paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of liability of this insurance and such other insurance.

A. WIDISS, *supra* note 77, at 296-97 app.

For an expanded examination of "other insurance" provisions, see Comment, *Double Coverage in Automobile Insurance Policies—the Problem of "Other Insurance" Clauses,* 47 TUL. L. REV. 1039 (1973).

[82] *See, e.g.,* Arminski v. United States Fidelity & Guar. Co., 23 Mich. App. 352, 178 N.W.2d 497, 498-99 (1970) (in a case of first impression, the court opted for a literal reading of the clause); Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 702 (Miss. 1974) (clear and unambiguous limits of liability clause held valid and effective to limit coverage to policy amounts); Pacific Indem. Co. v. Thompson, 56 Wash. 2d 715, 355 P.2d 12, 12-13 (1960) (limits of liability provisions not qualified by any other policy provision and must therefore be strictly followed); *cf.* State Farm Mut. Auto. Ins. Co. v. Bishop, 329 So. 2d 670, 672-73 (Miss. 1976) ("limits of liability" clause ineffective to defeat claimant's recovery of all the sums to which he is legally entitled); Southern Farm Bureau Cas. Ins. Co. v. Roberts, 323 So. 2d 536, 538 (Miss. 1975) (where insured issued three separate policies to one insured, "limits of liability" clause in each not effective to prevent aggregating all three).

[83] Note, *supra* note 70, at 155-56. The standard "limits of liability" clause provides, *inter alia:*

> The limit of liability stated in the [declaration] as applicable to "each person" is the limit of the company's liability for all damages because of bodily injury sustained by one person as the result of any one accident and, subject to the

allowing the stacking of coverages. First, the complexity and ambiguity of the "limits of liability" clause has produced the general rule, applicable to all insurance contracts, that such provisions will be strictly construed against the insurer and will be held ineffective to prevent the aggregation of coverages.[84] Second, many jurisdictions view clauses that limit coverage to the amount of one endorsement as unconscionable where a separate premium has been paid for each coverage.[85] As one justice stated, "[w]hen we pay a double premium we expect double coverage."[86] It is obvious that the jurisdictions are in a decided conflict, as no prevailing view of this issue can be discerned.[87] Nowhere is this conflict and lack of a prevailing view more apparent than in Mississippi. The court's handling of the issue has been characterized by confusion and contradiction. As early as 1971, the supreme court favored the idea of allowing an insured to aggregate UM coverages, despite the limitation of policy provisions.[88] In 1974, however, two decisions seemed to reverse

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> above provision respecting "each person," the limit of liability stated in the [declarations] as applicable to "each accident" is the total limit of the company's liability for all damages because of bodily injury sustained by two or more persons as the result of any one accident.

A. Widiss, *supra* note 77, at 293 app.

[84] *See* Employers Liab. Assurance Corp. v. Jackson, 289 Ala. 673, 270 So. 2d 806, 809-10 (1972) ("limits of liability clause [was] both ambiguous and difficult to understand"); Sturdy v. Allied Mut. Ins. Co., 203 Kan. 783, 457 P.2d 34, 41 (1969) ("Unclear and obscure clauses in a policy of insurance should not be allowed to defeat the coverage reasonably to be expected by the insured."); *cf.* Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 702 (Miss. 1972) (distinguished *Sturdy* and *Employers* on the wording of the particular clauses found therein).

[85] *See* Sellers v. United States Fidelity & Guar. Co., 185 So. 2d 689, 691-92 (Fla. 1966) ("other insurance" clauses must yield to statute requiring automobile liability policies to include uninsured motorist protection); Van Tassel v. Horace Mann Ins. Co., 296 Minn. 181, 207 N.W.2d 348, 352 (1973) ("[I]f the question must be resolved on the basis of who gets a windfall, it seems more just that the insured who has paid a premium should get all he paid for rather than that the insurer should escape liability for that for which it collected a premium."); Southern Farm Bureau Cas. Ins. Co. v. Roberts, 323 So. 2d 536, 538 (Miss. 1975) (same); Cunningham v. Insurance Co. of N. America, 213 Va. 72, 189 S.E. 2d 832, 836-37 (1972) (same). *But see* Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 702 (Miss. 1974) ("[T]he question of premiums has no proper place in determining whether insured has aggregate coverage under the uninsured motorist provisions of the policy.").

[86] Sturdy v. Allied Mut. Ins. Co., 203 Kan. 783, 457 P.2d 34, 42 (1969). This view has been criticized insofar as it overlooks the increased risk the insurer assumes when more automobiles and a greater range of possible claimants are included under its UM endorsement. *See* Note, *supra* note 70, at 158.

[87] *See* notes 80 through 85 *supra* and cases cited therein. *See generally* Comment, *Stacking of Uninsured Motorist Coverage—an Exercise In Judicial Interpretation,* 5 Cum.-Sam. L. Rev. 106, 107-09 (1974).

[88] In Harthcock v. State Farm Mut. Auto. Ins. Co., 248 So. 2d 456 (Miss. 1971), the court held that an "other insurance" clause was ineffective to prevent aggregation of

any inclination the court had to invalidate such clauses.[89] In *Talbot v. State Farm Mutual Automobile Insurance Co.,*[90] the court held that the stacking of UM endorsements would not be allowed if the limits of liability provision was clear and unambiguous.[91] Although not expressly addressing the point, the court seemed implicitly to concede that stacking would be appropriate if the limitation clause was found ambiguous. Even so, the soundness of *Talbot* is questionable in light of the more recent decisions in *Southern Farm Bureau Casualty Insurance Co. v. Roberts,*[92] and *State Farm Mutual Automobile Insurance Co. v. Bishop.*[93] In both cases, the Mississippi court allowed the insured to stack UM coverages despite the clear and unambiguous limits of liability clauses. Indeed, both seemed to place emphasis on the unconscionability of allowing the insurer to collect multiple premiums while restricting the claimant to a single coverage.[94]

Last year, in *Hartford Accident & Indemnity Co. v. Bridges,*[95] the court continued to rely heavily on evidence of separate premiums but refused to abandon the *Talbot* rationale completely.[96] In *Bridges,* the son of the insured was struck and killed by a hit and run driver. The insured owned a policy with the defendant, Hartford Accident & Indemnity Co., which covered three automobiles. Under the terms of the policy, each automobile had a separate UM endorsement and the insured paid separate premiums for each coverage. At the trial level the insurer conceded its liability for the $10,000.00 statutory minimum, but denied liability for an aggregated sum of $30,000.00. The insurer contended that the limits of liability clause[97] of the policy restricted its total

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coverages and the UM coverages of all applicable policies were available to the injured insured until sums for which the uninsured motorist was liable were recovered. *Id.* at 461-62.

[89] *See* Carroll v. Government Employees Ins. Co., 372 F. Supp. 405, 406-07 (S.D. Miss. 1974) (limits of liability clause was effective to preclude stacked coverage); Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 701-02 (Miss. 1974) (distinguished holding in Harthcock v. State Farm Mut. Auto. Ins. Co. and found unambiguous limits of liability provision effective to prevent stacking).

[90] 291 So. 2d 699 (Miss. 1974).

[91] *Id.* at 702.

[92] 323 So. 2d 536 (Miss. 1975).

[93] 329 So. 2d 670 (Miss. 1976).

[94] *See* State Farm Mut. Auto. Ins. Co. v. Bishop, 329 So. 2d 670, 672-73 (Miss. 1976) (two separate policies issued by one insurer stacked); Southern Farm Bureau Cas. Ins. Co. v. Roberts, 323 So. 2d 536, 537-38 (Miss. 1975) (three separate policies issued by one insurer stacked since insured paid a separate premium for each).

[95] 350 So. 2d 1379 (Miss. 1977).

[96] See notes 90 & 91 and accompanying text *supra.*

[97] The clause provided:

> The limit of liability for uninsured motorist coverage stated in the declarations as applicable to "each person" is the limit of the company's liability for all

liability to that of a single endorsement and the statutory minimum. The circuit court, sitting without a jury, entered judgment for the plaintiff-insured for the full $30,000.00.

In a unanimous affirmation of the Forest County Circuit Court's decision, the Mississippi Supreme Court announced that separate UM endorsements "for which a separate premium was charged and paid on each automobile can be aggregated or stacked to cover the damage suffered by an insured."[98] The court, relying on the *Talbot* decision for the proposition that an insurer could validly limit its UM coverage by a clear and unambiguous limits of liability clause,[99] found *Talbot* factually distinguishable. In finding the clause in question ambiguous and ineffective,[100] the court went on to hold that where, as here, the insured had paid separate premiums for each coverage, a greater burden was placed upon the insurer's limiting provisions to be clear and easily understandable.[101] While the charging of separate premiums for each UM coverage was not conclusive, the *Bridges* court reasoned that a presumption would arise that the coverages were to be treated as separate policies whenever separate charges were made.[102] Accordingly, the court stated that "uninsured motorists coverage contained in one policy of insurance insuring three automobiles, and for which a separate premium was paid, can be aggregated or stacked."[103]

With the decision in *Bridges,* the court has apparently attempted to take a definitive line in stacking cases and end some of the confusion prevailing in this jurisdiction. Its holding fuses two separate and distinct rationales into one concise test; stacking is permissible when it is shown that separate premiums were charged and paid for the coverages,[104] and

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> damages, including damages for care or loss of services, because of bodily injury sustained by one person as the result of any one accident and, subject to the above provision respecting each person, the limit of liability stated in the declarations as applicable to "each accident" is the total limit of the company's liability for all damages, including damages for care or loss of services, because of bodily injury sustained by two or more persons as the result of any one accident.

Id. at 1381.

[98] *Id.* at 1380.

[99] *Id.* at 1381.

[100] The court cited Employers Liab. Assurance Corp. v. Jackson, 289 Ala. 673, 270 So. 2d 806 (1972), which had held an identical provision ambiguous. *Id.* at 809-10. Following the well-settled Mississippi rule, therefore, it construed the clause most strongly against the insurer and in favor of the insured. *See* State Farm Mut. Ins. Co. v. Taylor, 233 So. 2d 805, 810 (Miss. 1970) (stating general rule that insurance contracts will be construed most strongly against the insurance company).

[101] Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1381 (Miss. 1977).

[102] *Id.*

[103] *Id.* at 1380.

[104] See notes 92 & 93 and accompanying text *supra.*

limits of liability clauses, when found to be ambiguous, will be construed in favor of the insured and, therefore, will be ineffective to prevent stacking.[105] The precise holding of *Bridges* seems to be that an insurer may preclude the aggregation of UM coverages, even when separate premiums have been paid, but only when the applicable limits of liability clause is clear and unambiguous.

The decision, however, leaves the court in an ambiguous position. The *Bridges* court readily concedes its doubts about the validity of the *Talbot* holding.[106] *Talbot* has proven to be of dubious precedential value since the court continuously finds it necessary to distinguish *Talbot* on its facts in order to reach a just solution.[107] It is arguable that the decisions in *Bishop* and *Roberts* present formidable barriers which prevent *Talbot* from being adopted as controlling authority;[108] thus, these three decisions cannot be reconciled. Nonetheless, since the *Talbot* logic apparently has continuing usefulness to the court, it is hoped that *Bridges* resolves the confusion that results from having two conflicting precedents in regard to the stacking of claims.

B. *Defining "The Insured"*

In construing terms that restrict coverage in auto liability insurance contracts, most courts have applied the same basic rules that are applied in interpretation of the language of any insurance agreement.[109] A majority of jurisdictions liberally construes limiting provisions that define the insured as one "in" or who "uses" or who is "upon" the insured vehicle when the injury was sustained.[110] More particularly, the courts have predominantly employed a broad view concerning the scope of the term "insured" in determining whether an individual standing outside of the insured vehicle is excluded under these limitation clauses.[111] As long as the injured claimant is within a definable area around the insured vehicle or is engaged in a task related to its operation, the claimant is considered to be within the scope of the coverage. These holdings conform to the view that courts should liberally construe a policy whenever possible to provide coverage.[112]

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[105] See notes 90 & 91 and accompanying text *supra.*

[106] Hartford Accident & Indem. Co. v. Bridges, 350 So. 2d 1379, 1381 (Miss. 1977).

[107] See notes 92 through 103 and accompanying text *supra.*

[108] See notes 92 through 94 and accompanying text *supra.*

[109] *See* Annot., 39 A.L.R.2d 952, 953 (1955).

[110] *See, e.g.,* United Farm Bureau Mut. Ins. Co. v. Pierce, 152 Ind. App. 398, 283 N.E.2d 788, 790 (1972) (found "upon" ambiguous and to be construed narrowly against insurer and liberally in favor of insured); Henderson v. Hawkeye-Security Ins. Co., 252 Iowa 97, 106 N.W.2d 86, 89 (1960) ("while in" and "upon" require a broad and liberal construction); Hendricks v. American Employers Ins. Co., 248 La. 15, 176 So. 2d 827, 831 (Ct. of App. 1965) (plaintiff leaning over truck to lift bucket therefrom was "upon"); Whisnant v. Aetna Cas. & Sur. Ins. Co., 264 N.C. 303, 141 S.E.2d 502, 506 (1965) (injury sustained while pushing stalled auto arose out of the "use" of that auto).

[111] *See, e.g.,* Wolf v. American Cas. Co., 2 Ill. App. 2d 124, 118 N.E.2d 777, 779-80 (1954) (driver hit by another auto while standing two to three feet from his wrecked auto was "upon" the insured vehicle); Smith v. Girley, 260 La. 223, 255 So. 2d 748, 751 (1971)

The same is true in regard to statutorily mandated uninsured motorist endorsements. The general rule is that the provisions of the statute itself will be broadly applied,[113] while a more narrow and restrictive view will be taken of policy exclusions and limitations. Although Mississippi decisions construing this state's UM coverage under section 83-11-103[114] are few in number, it can be said that the Mississippi Supreme Court has followed these same precepts in interpreting and defining coverage under that section.[115] In its last decision construing section 83-11-101 prior to 1977,[116] the court held that the insured's failure to request UM coverage in its written proposal for liability insurance did not con-

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(coverage allowed for deputy sheriff hit while standing near police vehicle while on official business); State-Wide Ins. Co. v. Murdock, 31 A.D.2d 978, 299 N.Y.S.2d 348, 349 (App. Div.) (passenger struck within seconds after leaving vehicle held "occupying" the vehicle), *aff'd,* 25 N.Y.2d 674, 306 N.Y.S. 2d 678 (1969).

[112] *See, e.g.,* Weathers v. Mission Ins. Co., 258 So. 2d 277, 279 (Fla. Dist. Ct. App. 1972) (where statute provides that uninsured motorist coverage could be rejected only by a named insured, insured's wife, who procured the policy for him, could not waive such coverage); Posey v. Commercial Union Ins. Co., 332 So. 2d 909, 913 (La. Ct. of App. 1976) (motorcycle held to be a "motor vehicle" for purposes of bringing insured within uninsured motorist coverage); Sherman v. New York Cas. Co., 78 R.I. 393, 82 A.2d 839, 841 (1951) (insured held to be "upon his car" when he placed his hands and knees upon it in attempt to stop it from rolling). See note 109 and accompanying text *supra.*

[113] *E.g.,* Reserve Ins. Co. v. Staats, 9 Ariz. App. 410, 453 P.2d 239, 242 (1969); Weathers v. Mission Ins. Co., 258 So. 2d 277, 279 (Fla. Dist. Ct. App. 1972); Van Hoozer v. Farmers Ins. Exch., 219 Kan. 595, 549 P.2d 1354, 1364 (1976).

[114] *See, e.g.,* State Farm Auto. Ins. Co. v. Reeves, 292 Ala. 218, 292 So. 2d 95, 99 (1974) (policy exclusion found in violation of statute's broad coverage, therefore void); Farmers Ins. Exch. v. McDermott, 34 Colo. App. 305, 527 P.2d 918, 919 (1974) (policy requirement that hit-and-run claim show contact between insured vehicle and uninsured vehicle held an impermissible restriction on statute's coverage); Thomas v. Nelson, 295 So. 2d 847, 851 (La. Ct. of App.) (policy exclusion of motorcycle found to be more restrictive than statute, therefore void), *aff'd,* 299 So. 2d 791 (La. 1974). Implicit in these holdings is the rule that where a conflict arises between the wording of the policy and that of the statute, the statute will prevail. *See* MISS. CODE ANN. § 83-11-101 (Supp. 1977).

[115] *See, e.g.,* Preferred Risk Mut. Ins. Co. v. Poole, 411 F. Supp. 429, 436-37 (N.D. Miss. 1976) (uninsured motorist statute is to be liberally construed and policy restrictions which reduce its coverage are void); Parker v. Cotton Belt Ins. Co., 314 So. 2d 342, 344 (Miss. 1975) (uninsured motorist statute is remedial in nature and must be liberally construed); Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428, 433 (Miss. 1973) (negating effect of restrictive conditions of policy); Hodges v. Canal Ins. Co., 223 So. 2d 630, 634 (Miss. 1969) (looked to broad purpose and intent of statute from perspective of injured insured).

[116] Parker v. Cotton Belt Ins. Co., 314 So. 2d 342 (Miss. 1975).

stitute a written rejection which is required under the statute[117] to preclude attachment of the coverage. Thus, the statutory provision that the insured "shall reject the coverage in writing"[118] must be liberally construed to accomplish its intended remedial purpose.[119]

During 1977, the supreme court, in *Stevens v. United States Fidelity & Guaranty Co.*,[120] further extended the rationale expressed in prior decisions. In *Stevens*, the plaintiff was employed as an operator of a wrecker for an auto salvage yard. His employer maintained UM coverage on the wrecker with the defendant insurer. After responding to an accident call one night, the plaintiff left the vehicle momentarily to sweep debris from the accident site, such action being part of his assigned duties. As he was attending this task and standing six to eight feet from the wrecker, he was struck by a passing auto and suffered substantial injuries. Although the negligent driver of the other vehicle was uninsured, the insurer denied liability and rejected the claim. In the ensuing litigation, the Lee County Circuit Court directed a verdict for the insurer based upon its belief that the plaintiff was too far removed from the insured vehicle to be included within the policy definition of "insured."[121]

On appeal, the supreme court reversed, stating that the injuries received by an operator of an insured vehicle, although incurred while standing outside the vehicle, "arose out of the use of"[122] the vehicle and were within the coverage provided by the UM endorsement.[123] Commissioner Howard R. Pigford, writing for the court, found the trial court's reliance on the policy provisions unwarranted and misplaced. The controlling terms were those found in section 83-11-103 of the Mississippi Code Uninsured Motorist Coverage.[124] The statute provides that "any person who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies" is an "insured."[125] It was clear that the plaintiff in *Stevens* was operating the insured vehicle with the express consent of his employer. The fact that the plaintiff was not "in" or "upon" the vehicle when he was injured offered little conceptual difficulty for the court. Liberally construing the statutory definition of "insured," the *Stevens* court molded its decision to conform with the public policy behind the legislation.[126] That policy, as pronounced by the court in an earlier decision,[127] is to give the insured protection equivalent to that he would have had if the negligent motorist had been insured to the minimum level set by the state's financial responsibility statute.[128] Finding the essential issue to be whether the plaintiff was "using" the wrecker when injured, the court reasoned that removing the debris from the accident site was an essential part of the use of the vehicle. The *Stevens* court reversed, stating that "[the plaintiff's] temporary absence from the wrecker for the purpose of performing the necessary task of removing debris from the highway did not amount to abandonment of the use of the wrecker."[129]

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[117] Miss. Code Ann. § 83-11-101 (Supp. 1977) states, *inter alia*, "The coverage herein required shall not be applicable where any insured named in the policy shall reject the coverage in writing . . . ."

[118] 314 So. 2d at 344.

[119] *Id.*

[120] 345 So. 2d 1041 (Miss. 1977).

[121] *Id.* at 1042. The precise language of the provision on which the defendant relied and upon which the lower court based its opinion was not reported. *Id.*

[122] *Id.* at 1044.

[123] *Id.*

[124] There was authority for this holding even though the court failed to cite it. *See* State Farm Mut. Auto. Ins. Co. v. Talley, 329 So. 2d 52, 54 (Miss. 1976) (where statute defined coverage but policy denied it, statute prevailed); Lowry v. State Farm Mut. Auto. Ins. Co., 285 So. 2d 767, 777 (Miss. 1973) (same).

[125] Miss. Code Ann. § 83-11-103 (1972).

The problem of precisely defining "insured" also arose last year in *Gillespie v. Southern Farm Bureau Casualty Insurance Co.*[130] There the court faced another aspect of the statutory definition of "insured," when it sought to determine whether the insured's deceased relative was within either the statutory or policy definition of "insured," despite the fact that she was not a member of his household.[131] The plaintiffs, decedent's adult son and daughter, sought recovery for the wrongful death of their eighty year-old mother resulting from an auto crash between an uninsured vehicle driven by the decedent's second daughter[132] (the plaintiffs' sister) and another auto. The decedent was a passenger in the daughter's automobile and recovery was sought against the defendant, Southern Farm Bureau, who had issued UM endorsements to both plaintiffs. It was undisputed that the auto in which the decedent was injured was not covered under either of the plaintiffs' endorsements, and that, at the time of the accident, the mother was living in the household of the uninsured sister and not in the home of either plaintiff. The essential contention of the plaintiffs was that the terms of the UM endorsement contained in the insurer's policy extended coverage only for death which resulted from bodily injury to the insured.[133] This provision, it was argued, conflicted with the broader requirement of section 83-11-101, which allowed recovery for "all sums which [the insured] shall be legally entitled to recover as damages for bodily injury or death from the owner or operator of an uninsured motor vehicle."[134] Accordingly, the plaintiffs asserted that coverage should be extended to their claim under the terms of section 83-11-101. The trial court disagreed and sustained the insurer's demurrer and plea in bar.

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[126] 345 So. 2d at 1043.

[127] Rampy v. State Farm Mut. Auto. Ins. Co., 278 So. 2d 428 (Miss. 1973).

[128] *Id.* at 432.

[129] 345 So. 2d at 1044.

[130] 343 So. 2d 467 (Miss. 1977).

[131] MISS. CODE ANN. § 83-11-103 (1972) defines "insured" as "the named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, while in a motor vehicle or otherwise." *Stevens* dealt with the additional statutory definition of the "insured" as "any person who uses, with the consent, expressed or implied, of the named insured, the motor vehicle to which the policy applies." *Id.*

[132] The sister's auto was in fact insured under a liability policy, but an exclusion in the policy precluded coverage in this instance for the decedent's death because the decedent was living in the same household with the driver. The plaintiffs contended, therefore, that the mother's injuries were received at the hands of an uninsured motorist and that their carrier, the defendant, was liable under its UM endorsement. Interestingly, this argument was not contested on appeal. 343 So. 2d at 469.

On appeal, the supreme court rejected the appellants' contention, finding that any conflict between the statutory and policy provisions was only apparent and not real, and that the definition of "insured" under the policy coincided with that set out by the statute.[135] Moreover, the appellants' claim would be excluded under either provision, since relatives of the insured were provided UM coverage only if they were residents of the insured's household, or were injured while using or occupying the insured vehicle. Therefore, the decedent failed to come within a class of persons covered under either provision.[136]

Stevens and *Gillespie* are important in that they provide needed judicial interpretation of Mississippi's complex UM statute. *Stevens,* along with a few prior decisions of the court,[137] indicates that the court will broadly construe UM coverage to provide some semblance of protection to the innocent victims of negligent uninsured motorists, notwithstanding limiting policy provisions that are clearly contrary. The *Stevens* court clearly aligned itself with the prevailing view on such coverage[138] and provided valuable precedent for dealing with the uninsured motorist.

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[133] *Id.* The policy provision states:

> To pay all sums . . . which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called 'bodily injury', sustained by the insured . . . .

Id. at 470.

[134] MISS. CODE ANN. § 83-11-101 (Supp. 1977).

[135] 343 So. 2d at 470. The policy's endorsement defined the insured as, "(1) the First Named Insured as stated in the policy and while residents of the same household, his spouse and relatives of either; (2) any other person while occupying an insured automobile with permission of the named insured or spouse." *Id.*

[136] The court cited as dispositive, Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699 (Miss. 1974), which had similarly interpreted and defined the coverage of § 83-11-103. 343 So. 2d at 470.

[137] See note 111 and accompanying text *supra.*

[138] See note 115 and accompanying text *supra.*

The decision rendered by the *Gillespie* court, while not as broad a reading of section 83-11-103 as *Stevens,* provides Mississippi with a strong interpretation of the statutory provision dealing with the inclusion of relatives as insureds. UM provisions restricting insured status to those relatives who reside in the household of the named insured are liberally interpreted when used to define the extent of coverage, but narrowly construed when utilized to exclude coverage.[139] In *Gillespie,* the individual claiming coverage was clearly not within the statutory or policy definition of "insured," leaving the court no choice but to refuse the coverage.

V. SPECIFIC PERFORMANCE OF THE INSURANCE CONTRACT

In a suit for breach of an indemnity contract whereby the insurer was to pay periodic future installments for disability or death, a successful plaintiff is limited to recovery of installments which have accrued prior to the judgment.[140] Underlying this rule is the rationale that these insurance contracts, as agreements to pay a debt in installments, are not divisible, and cannot be anticipatorily breached.[141] Thus, the insurer cannot be held liable for anything beyond those installments already accrued and due. Although this is the prevailing doctrine, contrary authority exists which permits action upon the entire contract once it has been breached by the insurer.[142] Still other courts uphold judgments ordering the payment of future installments as they accrue, conditioning this remedy upon the insured's ability to prove continuing disability.[143]

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[139] Widiss, *Uninsured Motorist Coverage: When Are Spouses and Relatives Insured as "Residents",* 24 FED'N OF INS. COUNSEL Q. 35, 35-36 (1973).

[140] *See, e.g.,* Howard v. Benefit Ass'n of Ry. Employees, 239 Ky. 465, 39 S.W.2d 657, 658 (1931) (judgment for future installments would be based on speculation of life expectancy and right of insured to collect might never accrue); Benefit Trust Life Ins. Co. v. Baker, 487 S.W.2d 406, 411 (Tex. Ct. App. 1972) (a judgment for future installments would be in effect an advisory opinion on the presumption of the insured's continuing disability); Greguhn v. Mutual of Omaha Ins. Co., 23 Utah 2d 214, 461 P.2d 285, 287 (1969) (no repudiation can amount to an anticipatory breach or installments not yet due).

[141] *See generally* 21 J. APPLEMAN, *supra* note 5, § 12582 (1962).

[142] *See, e.g.,* Colonial Life & Accident Ins. Co. v. Newman, 152 Ind. App. 554, 288 N.E.2d 195, 196 (1972) (where there has been a total breach or repudiation by insurer, future benefits may be subject of action); National Mut. Accident Ins. Co. v. Hicks, 65 S.W.2d 805, 808 (Tex. Ct. App. 1933) (judgment granting matured benefits and decreeing insurer's liability for future installments held proper when facts upheld plea).

[143] *See, e.g.,* Equitable Life Assurance Soc'y v. Goble, 254 Ky. 614, 72 S.W.2d 35, 36-37 (1934) (judgment allowed which granted future installments as long as disability continues); Mancuso v. Equitable Life Assurance Soc'y, 151 So. 2d 511, 513-14 (La. Ct. of App. 1963) (absolute judgment for future liability amended to cover only period during which plaintiff is totally disabled).

The Mississippi Supreme Court has historically followed the rule that upon the breach of an insurance contract specifying periodic disability payments, the insured may only maintain an action for payments that have accrued prior to the litigation and the insurer has no obligation to pay those not yet due.[144] In an early decision, *Atlantic Life Insurance Co. v. Serio,*[145] the court indicated a disposition to refuse to allow an insured's action for benefits until the time for payment had passed without payment being made. The court reaffirmed this notion last year, rendering a 6-3 decision in *National Old Line Insurance Co. v. Brownlee.*[146] The *Brownlee* majority adhered to the *Serio* logic, reversing a chancellor's decree of specific performance under a mortgage disability policy. The plaintiff-insured had purchased the policy from the defendant-insurer in December, 1966. After a disabling illness in March, 1972, the insured made a claim for disability payments under the terms of the policy. The insurer refused payment, contending that the insured's illness was of a nature excluded from coverage under the policy's elimination clause.[147] This contention was rejected and the insurer was adjudged liable for the payments. Accordingly, the chancellor found that the insured's bill of complaint stated a cause of action for specific performance and ordered the insurer to pay the installments then due and future payments as they accrued, upon proof of the insured's continuing disability.

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[144] Atlantic Life Ins. Co. v. Serio, 171 Miss. 726, 729-30, 157 So. 474, 475 (1934); Metropolitan Life Ins. Co. v. Lambert, 157 Miss. 759, 769, 128 So. 750, 753 (1930).

[145] 171 Miss. 726, 157 So. 474 (1934). There the insurer had refused to pay disability payments to the insured, contending a lack of real disability, and the insured sought to recover for the payments then due and those thereafter to become due. Although the insurer attempted to concede its liability under the policy for the future installments and raise the statute of limitations as a defense, the court refused and held that there was no obligation on the insurer to make the monthly payments in advance of their accrual date. *Id.* at 729-30, 157 So. at 475.

[146] 344 So. 2d 513 (Miss. 1977).

[147] The policy, by its terms, excluded "any loss caused by and resulting from: NEOPLASM AND/OR INGUINAL HERNIA." *Id.* at 514. The insurer contended that the cancerous growth found on the plaintiff's bladder and which caused the disability came within this definition. There was conflicting expert testimony at the trial as to exactly what the terms encompassed and specifically as to whether they included the insured's claim. The court, finding the terms a vague and ambiguous exception to the policy, followed the well-settled principle that such ambiguous terms will be construed most strictly against the insurer inasmuch as it was the creator of the provision. *Id.*; *see* McLaurin v. Old South Life Ins. Co., 334 So. 2d 361, 363 (Miss. 1976) (where insurance company chose to use the "vague term 'alcoholism,' " any ambiguity as to the meaning of the term will be construed in favor of the insured); Home Owner's Ins. Co. v. Keith's Breeder Farms, Inc., 227 So. 2d 293, 295 (Miss. 1969) (insurance covered damage to poultry house; equipment, supplies, and nests were damaged by wind during annual cleaning, the damage was covered by the policy).

The *Brownlee* court, reversing the chancellor's decree,[148] reasoned that no cause of action warranting specific performance was presented. The bill merely averred to the insured's disabilities suffered while the policy was in force and to the insurer's refusal to pay the monthly installments under its policy terms. In addition, the court found that there was a continuing possibility that the insured's disabled condition might change subsequent to trial and he might be able to work in another occupation.[149] An aggressive dissent challenged the majority's cursory treatment of the matter and its reliance upon the earlier *Serio* decision.[150] Justice Sugg, writing for the dissenters, conceded the validity of the *Serio* decision, but rejected its application to the facts of *Brownlee,* finding the two cases clearly distinguishable. The dissent correctly pointed out that the plaintiff in *Brownlee* sought only to compel the payment of future installments when they became due and only in the event that the plaintiff's disability continued.[151] He did not contend that the payments should be accelerated or the benefits recovered prior to the time they accrued.

The *Brownlee* dissent found a valid distinction, supported by authority,[152] which would render *Serio* inapplicable. The courts of several jurisdictions have ordered payment of future installments as they become due, provided proof of continuing disability is shown and the insured survives.[153] In one case,[154] it was held that such a judgment merely imposes upon the insurer a duty to make monthly installments as they become due; it did not represent a judgment for the present recovery of benefits not yet matured.

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[148] The court did uphold, however, the chancellor's finding that the insured was "wholly and continuously disabled." 349 So. 2d at 516. Under the applicable policy provision the insured, to be totally disabled, must have been "prevented by reason of said injury or sickness from engaging in each and every occupation or employment for wage or profit for which he is reasonably qualified by education, training or experience . . . ." *Id.* The evidence on this point in the insured's favor showed that he had been retired by his former employer, and placed on total disability for Social Security and Veteran's Administration benefits. Moreover, when questioned as to whether he had attempted to pursue any other occupation besides his former one as a heavy equipment worker, the insured testified, "No, sir, I ain't able to do it." *Id.*

[149] *Id.* at 515-16.

[150] *Id.* at 517-19.

[151] Justice Sugg interpreted the chancellor's decree as ordering the insurer's compliance with the contract by paying the disability payments as they accrued, provided there was proof of continuing disability. He disagreed with the majority's characterization of the decree as a judgment of absolute liability for the future unaccrued installments. *Id.* at 517-18. Neither opinion sets out the particulars of the decree.

[152] *See, e.g.,* Supreme Tent of Knights of Maccabees v. Cox, 25 Tex. Civ. App. 366, 371, 60 S.W. 971, 973 (1901) ("This case is not in the nature of an action for specific performance of a contract, nor one to enforce a lien either upon property or a specific fund, but to recover a debt, some of which is not due.").

[153] *See, e.g.,* John Hancock Mut. Life Ins. Co. v. Bobo, 230 Ala. 650, 162 So. 287, 288 (1935) (granted specific performance for future installments); Prudential Ins. Co. v. Bridgman, 256 Ky. 575, 76 S.W. 2d 639, 640 (1934) (awarded future benefits but preserved right of insurer to avoid judgment upon proof of a change in the insured's condition).

[154] Equitable Life Assurance Soc'y v. Goble, 254 Ky. 614, 620, 72 S.W.2d 35, 38 (1934).

The dissent in *Brownlee* focused upon other equitable considerations supporting affirmation of the chancellor's decree. For example, the insured had no adequate remedy at law. The court's failure to order specific performance of the contract would effectively deprive the insured of adequate enforcement of his rights. Furthermore, unlike a decree for specific performance, the remedy at law would require no further supervision by the court, but would merely shift the burden of proving changed circumstances from the insured to the insurer.[155]

A close analysis of Justice Sugg's dissent indicates that the majority was perhaps hasty in rejecting the insured's claim. Although admittedly well enunciated in *Serio,* the principle used was inapplicable in *Brownlee.* For this and other reasons cited in the dissent, closer scrutiny is necessary in deciding the applicability of an equitable decree to the present facts. Perhaps, as Justice Sugg stated, "[T]he time has come for the equity courts to enforce such contracts by way of specific performance . . . ."[156] Although the decisions advocating a view contrary to *Brownlee* are somewhat dated, the rationale of those cases is nevertheless valid and offers substantial advantages over that espoused by the *Brownlee* majority. For the insured, a decree of specific performance will preclude unnecessarily prolonged and expensive circuity of action. All basic issues concerning the insurer's liability would be resolved in one hearing and no further action would be required unless the disability ceases to exist.[157] This is a particularly desirable remedy in light of the historic desire of equity courts to do complete justice in one proceeding.[158] Under a decree of specific performance, the court's prior determination of the insurer's liability would merely serve as a basis for enforcing the contract terms, and would not impose upon the insurer any demands or risks not previously contemplated. Moreover, specific performance preserves the insurer's right to avoid future liability upon proof of a change in circumstances or death of the insured. Infringing upon no valuable or substantial contract right, such a remedy will actually benefit the insurer by precluding the needless litigation required to defend actions brought by the insured seeking to enforce the agreement.

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[155] 349 So. 2d at 518-19.

[156] *Id.* at 518.

[157] *Id.*

[158] V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE § 36 (2d ed. 1950).

VI. PLAINTIFFS—BENEFICIAL INTEREST OF INSURED

Credit life insurance has recently become an increasingly popular phenomenon,[159] providing protection for both the debtor and creditor in a variety of transactions.[160] Problems encountered in analogous situations, however, made it obvious that conflicts would arise as to who was the proper party to bring suit on a purported claim for which the insurer denied liability. In some situations, it would appear that the debtor, who paid the premiums for the benefit of the creditor, was the proper party.[161] On the other hand, under the loss payable clause, the creditor was the real party in interest and apparently had the preeminent right to bring any action.[162] Judicial opinion is still somewhat divided on this fundamental issue. In addition, decisional law concerning the specific issue is scant. In order to discern any trends, the closely analogous situation of mortgagors and mortgagees must be examined.

Modern practice has created the rule that where a mortgage debt equals or exceeds the loss under a policy containing a loss payable clause to the mortgagee, the mortgagee is the proper person to bring an action.[163] The mortgagee is generally considered the real party in interest and, therefore, the most likely party to have standing. Even so, there exists contrary opinion to the effect that the debtor, whether he is a mortgagor,[164] cosignee,[165] or pure debtor,[166] has an insurable interest in the policy's proceeds and should be allowed to join the real party in interest in bringing the action,[167] or to bring it alone.[168]

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[159] CONSUMER CREDIT LIFE AND DISABILITY INSURANCE 1 (C. Hubbard ed. 1973). The growth in the industry has been spectacular. In 1945 the amount of credit life insurance written amounted to less than a half a million dollars. By the latter part of 1970, the figure had increased to a total of 88 billion dollars. During the same period, the percentage of consumer credit protected by such coverage grew from about 7% to 69%. *Id.*

[160] *Id.*

[161] *See, e.g.,* Albert v. Cuna Mut. Ins. Soc'y, 255 So. 2d 170, 173 (La. Ct. of App. 1970) (member of credit union had actual and real interest in policy despite loss payable clause in favor of union); O'Neill v. Standard Ins. Co., 296 Or. 357, 554 P.2d 997, 999 (1976) (decedent's estate could maintain suit against insurer on loan cancellation life insurance in place of creditor beneficiary).

[162] *See, e.g.,* United States v. Fishing Vessel Mary Ann, 466 F.2d 63, 64 (5th Cir. 1972) (mortgagee loss payable clause creates independent agreement between insurer and mortgagee for latter's benefit and mortagor has no rights under such clause), *cert. denied,* 410 U.S. 929 (1973); Seaboard Fire & Marine Ins. Co. v. Keys, 224 Ark. 648, 275 S.W. 2d 640, 640 (1955) ("payable first" clause in favor of mortgagee rendered it proper party to bring action); Potomac Ins. Co. v. Weatherly, 43 S.W.2d 653, 654 (Tex. Ct. App. 1931) (mortgagee could bring action, especially where mortgage debt exceeded amount due on policy).

[163] Pavano v. Western Nat'l Ins. Co., 139 Conn. 645, 96 A.2d 470, 471 (1953); Klamen v. American Auto. Ins. Co., 492 S.W.2d 390, 391 (Mo. Ct. App. 1973); Aetna Ins. Co. v. Ralls, 200 Okla. 32, 190 P.2d 787, 789 (1948).

[164] Stuyvesant Ins. Co. v. A.C. Smith Motor Sales Co., 135 Miss. 585, 593, 99 So. 575, 576 (1924).

[165] Cincinnati Ins. Co. v. Palmer, 297 So. 2d 96, 98 (Fla. Dist. Ct. App. 1974); Community Bank v. McKenzie, 32 N.C. App. 68, 230 S.E.2d 788, 791-92 (1977).

[166] Albert v. Cuna Mut. Ins. Soc'y, 255 So. 2d 170, 173 (La. Ct. of App. 1970).

Historically, the Mississippi court has followed the prevailing rule.[169] However, in the 1924 case of *Stuyvesant Insurance Co. v. Motor Sales Co.*,[170] the court qualified this holding to permit the mortgagor to instigate the action. The supreme court in *Stuyvesant* held that the insured mortgagor has a beneficial interest in the proceeds of the insurance policy when the mortgage debt exceeds the loss under the policy.[171] In *Stuyvesant* the critical distinction from past cases was the mortgagee's acquiescence in the mortgagor's instigation of the suit.[172] Accordingly, the court limited its holding to similar situations where the mortgagee did not choose to press its rights.[173]

Last year, the supreme court, in *Standard Life Insurance Co. v. Veal,*[174] found the mortgagor-mortgagee logic of *Stuyvesant* applicable to a more conventional debtor-creditor relationship. In *Veal,* the insured-debtor negotiated a loan with a finance company and, as part of the loan agreement, obtained a decreasing term credit life insurance policy covering himself and his wife. Upon the death of the insured's wife, the insurer denied liability and refused to honor the claim.[175] Although the policy contained the standard loss payable clause naming the finance company as creditor-beneficiary,[176] the company did not

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[167] General Mut. Ins. Co. v. Ginn, 283 Ala. 470, 218 So. 2d 680, 682 (1969).

[168] Better Valu Homes, Inc. v. Preferred Mut. Ins. Co., 60 Mich. App. 315, 230 N.W.2d 412, 413-14 (1975).

[169] United States v. Royal Exch. Assurance, 231 F. Supp. 650, 651 (N.D. Miss. 1964); Bacot v. Phoenix Ins. Co., 96 Miss. 223, 249, 50 So. 729, 734 (1909); East v. New Orleans Ins. Co., 76 Miss. 697, 701-02, 26 So. 691, 691-92 (1899); Lowry v. Insurance Co. of N. America, 75 Miss. 43, 45, 21 So. 664, 664 (1897).

[170] 135 Miss. 585, 99 So. 575 (1924).

[171] *Id.* at 593-94, 99 So. at 576.

[172] *Id.* at 592-93, 99 So. at 576. The bank-mortgagee had appeared in court and presented the following statement indicating its agreement with the mortgagor's action: "We hereby waive our rights under the policy, in the event that the present suit shall proceed to judgment." *Id.* at 592-93, 99 So. at 576. Accordingly, the court distinguished this as a case "where the holder of the legal title to the cause of action did not sue." *Id.* It further found that the waiver executed by the bank was sufficient to protect the insurer from an additional action by the bank. *Id.*

[173] *Id.*

[174] 354 So. 2d 239 (Miss. 1977).

[175] *Id.* at 242-43. Although the policy defined the "insured obligor" as "the principal or first signatory . . . and his or her spouse by marriage," the insurer denied liability stating, "we regret we cannot honor this claim since [the insured's spouse's] name did not appear on the debt instrument; so she had no insurable interest, and there was no debtor-creditor relationship." *Id.* at 241-43. Interestingly, this contention was not raised on appeal by the insurer. See note 41 and accompanying text *supra.*

[176] The clause provided:

> Beneficiary: Benefits payable under this certificate shall be paid to the Creditor

bring any action against the breaching insurer. Suit was brought by the insured, however, in the Circuit Court of Hinds County. The jury awarded $26,008.00 in damages: $1,008.00 actual damages in the amount of the policy and $25,000.00 in punitive damages.[177]

Appealing the award, Standard Life contended that the insured could not maintain the action since he was not the beneficiary under the loss payable clause. The Mississippi court, finding the logic of *Stuyvesant* appealing, rejected the insurer's contention.[178] Although in *Veal,* the finance company had not expressly waived its rights to bring the action, the court did not find this controlling.[179] By failing to bring an action to enforce the policy, the finance company left the insured without a way to recover the proceeds while simultaneously holding him liable for the full amount of his debt. Accordingly, the court adopted the *Stuyvesant* rationale and held that the insured's beneficial interest in the proceeds provided a reasonable basis upon which an action against

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> Policyholder, or at its direction to any subsidiary, affiliate, or other creditor to whom the Creditor Policyholder may have transferred title to the indebtedness, as irrevocable Credit Beneficiary, as its interest may appear. Such amount shall be applied toward the discharge of the indebtedness of such Insured Obligor and payment by the Company shall completely discharge the Company's liability with respect to the amount so paid. Any balance remaining after payment of the Insured Obligor's indebtedness to the Creditor Beneficiary shall be paid to the estate of the Insured Obligor as second beneficiary, or in the case of disability benefits, to the Insured Obligor.

354 So. 2d at 243.

[177] *Id.* at 240-44. See notes 37 through 52 and accompanying text *supra.*

[178] 354 So. 2d at 243-44. The court also rejected the insurer's contention that no premium had been charged or collected for joint coverage under the policy. The court found this to be the mistake of the insurer's agent in computing the premium and in such a case the contract could be reformed to reflect the intended premium. *Id.*; *see* Johnson v. Consolidated Am. Life Ins. Co., 244 So. 2d 400, 402 (Miss. 1971) (mistake in drafting of insurance contract is in essence mutual and reformation is permissible). Moreover, the court found the premium that was charged was sufficient to give joint coverage for at least 18 months, well within the time of the insured's wife's death. 354 So. 2d at 247.

Likewise, the court refused to hold that the deceased wife's estate constituted the second beneficiary under the coverage agreement. Although the policy provided that any balance remaining after payment of the indebtedness to the creditor beneficiary would be paid to the estate of the insured as second beneficiary, it also provided that the face amount of the policy would never exceed the debt covered. Therefore, the court found that under no circumstances could the estate of the deceased become a second beneficiary. *Id.* at 245.

[179] The court's opinion fails to explain at any point the reason for the finance company's failure to file suit. This was seen by the court, however, as a mere nonjoinder by the plaintiff which could have been remedied prior to the trial by an amended declaration. 354 So. 2d at 245; *see* MISS. CODE ANN. §§ 11-7-21, -23 (1972) (regarding nonjoinder and misjoinder); Williams v. Home Ins. Co., 168 Miss. 443, 449, 151 So. 728, 730 (1934) (nonjoinder); Kelly v. Continental Cas. Co., 87 Miss. 438, 440, 40 So. 1, 1 (1906) (amended declaration).

the insurer could be sustained.[180]

The overall significance of the *Veal* decision is obvious as the ever increasing utilization of credit life insurance by various forms of creditors becomes commonplace. The sheer number of consumer credit transactions protected by such policies will assure the decision's importance.[181]

A brief discourse on various interests and relationships involved in such credit transactions will further illustrate the practical importance of *Veal.* Normally the lender, whether bank or finance company, serves in a dual capacity. First, the lender serves as the insurer's agent for transactions with the debtor. It solicits, or requires, the credit life coverage and assists the debtor in the application.[182] For most lending institutions, the commissions derived from this common practice are lucrative.[183] The result is a highly profitable relationship between the lender and insurer; thus, the lender is naturally hesitant to bring an action against the insurer. In addition, the potential risk of antagonizing the underwriter is often great, especially for a small consumer credit transaction as was involved in *Veal.* Second, the lender is still a creditor, maintaining a distinct interest in the proceeds of the policy. Under the loss payable clause, it is the prime beneficiary to the extent of its interest.[184] More specifically, the lender is concerned that the proceeds be applied to the insured's outstanding debt. Therefore, the lender is presented with two options; the lender may choose to delay action on its rights, or expressly waive them,[185] thereby permitting the insured-debtor to initiate an action on the policy. Alternatively, the lender may bring suit against the debtor's estate and rely on the estate subsequently to seek restitution from the insurer.[186]

The *Veal* decision is clearly a positive move by the court. The holding expands the protection afforded the insured-debtor and provides him a heretofore unrecognized right of action. This debtor protection is necessary against a creditor who finds it economically beneficial not to pursue its rights under the loss payable clause. A contrary holding would be inequitable, leaving the debtor at the mercy of the lender and insurer who are essentially business partners.

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[180] 354 So. 2d at 243-44.

[181] See note 159 *supra.*

[182] *See* R. RIEGAL & J. MILLER, INSURANCE PRINCIPLES AND PRACTICES 156 (5th ed. 1966) (general description of how "credit life" insurance operates).

[183] *See* CONSUMER CREDIT LIFE AND DISABILITY INSURANCE, *supra* note 159, at 29-31.

[184] See note 176 *supra.*

[185] Stuyvesant Ins. Co. v. A.C. Smith Motor Sales Co., 135 Miss. 585, 592-94, 99 So. 575, 576 (1924).

[186] See notes 163 & 169 *supra.*

VII. CONCLUSION

It is apparent that, in the area of insurance, the 1977 decisions cannot be summarily described as exhibiting either a totally progressive or retrogressive spirit. The court, at the conclusion of the year, could not be characterized as overly sensitive to the plight of the insured; nor was it unaware of the insured's problems. The vast majority of the decisions were merely routine and status quo oriented. The holdings in *Smith, Gillespie* and *Crews* merely adopted the predominant views and refused any moderation in outlook toward the problems they represented. The decision in *Brownlee* represents perhaps the most potent example of the court's intransigent attitude. There, the Mississippi Supreme Court totally rejected any liberalization of the settled rule and steadfastly adhered to precedent despite persuasive arguments for a more enlightened holding.

Even so, the holdings in *Schellenger, Stevens* and *Bridges,* while not reversing or modifying past lines, added needed clarity and content to their ambiguous precedents. In at least one decision, the court exhibited a progressive spirit and made a significant and far reaching statement. The holding in *Standard Life Insurance Co. v. Veal*[187] is undoubtedly the most noteworthy rendered in the area during the year. The *Veal* court refused to follow the prevailing rules, with a decisive move towards a just solution, notwithstanding the lack of precedential authority.

Mark D. Herbert

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[187] 354 So. 2d 239 (Miss. 1977).

PROPERTY

During 1977 the Mississippi Supreme Court heard over thirty property related cases that merited written opinions. The focus of this commentary is upon those decisions involving eminent domain, ouster of a cotenant by a cotenant in possession, partition, deeds, oil and gas, undue influence in a conveyance, and construction liens. Less than half of the property related opinions written by the court are discussed in the text of this review. Although a few cases are mentioned only in footnotes,[1] several cases are not discussed in either the text or the footnotes.[2] It is hoped that the cases chosen for discussion will be among those of most interest and importance to the student and practitioner of Mississippi property law.

I. EMINENT DOMAIN

A. *Application of the "Before and After" Rule*

The power of eminent domain, inherent in the concept of state, is subject to the constitutional limitation that "[p]rivate property shall not be taken or damaged for public use, except on due compensation being first made to the owner . . . in a manner . . . prescribed by law."[3] In Mississippi, due compensation is computed by the "before and after" rule,[4] that is, the difference in the land's value before the taking and its

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[1] See notes 12, 18 and 73 *infra.*

[2] The following 1977 cases are not discussed in this section: Joachim v. Villa Santini, Inc., 353 So. 2d 767, 768 (Miss. 1977) (establishment of public road by prescription); Combs v. Adams, 350 So. 2d 41, 42-43 (Miss. 1977) (en banc) (computation of time for sheriff's sale under execution); Pace v. Culpepper, 347 So. 2d 1313, 1316 (Miss. 1977) (applying rule against perpetuities to an option contract); Adams County v. McCoy, 347 So. 2d 366, 368 (Miss. 1977) (adverse possession in absence of law authorizing disposition of public land); City of Jackson v. Shell Oil Co., 347 So. 2d 340, 341 (Miss. 1977) (res judicata effect of prior zoning order); Mississippi State Highway Comm'n v. Tyner, 345 So. 2d 1050, 1051 (Miss. 1977) (responsibility of Highway Commission for installation of culverts on private land); Stuart v. Smith, 344 So. 2d 127, 129-30 (Miss. 1977) (construction of reservation in land conveyance); McGee v. Clark, 343 So. 2d 486, 489-90 (Miss. 1977) (specific performance of option contract to purchase land); Magnolia Fed. Sav. & Loan Ass'n v. Randal Craft Realty Co., 342 So. 2d 1308, 1311 (Miss. 1977) (assessment of real estate broker's commission in a quasi-contractual situation); Stevenson-Whisenhunt Corp. v. Holeman, 341 So. 2d 657, 660 (Miss. 1977) (waiver of stipulation in written contract by parol agreement and acquiescence in prior dealings).

[3] MISS. CONST. art. 3, § 17.

[4] When part of a tract of land is taken in an eminent domain suit, the owner is compensated for the loss on the basis of this rule. The formula was first stated in Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940):

> [T]he owner should be awarded the difference between the fair market value of the whole tract immediately before the taking, and the fair market value of that remaining immediately after the taking, without considering general bene-

value after the taking. The taking of land for public use occurs when suit is filed in the special court of eminent domain,[5] and the "before and after" value is computed as of the date the petition is filed.[6]

The Mississippi Supreme Court has confronted eminent domain matters with marked frequency in this decade,[7] and last year was no exception. Two decisions of the 1977 supreme court focused on application of the "before and after" rule. In *Highway Development Co. v. Mississippi State Highway Commission,*[8] the appellant, a land speculator, purchased acreage adjacent to a proposed interstate interchange,

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> fits or injuries resulting from the use to which the land taken is to be put, that are shared by the general public.

Id. at 866, 198 So. at 569.

As the court in *Hillman* noted, *id.* at 867, 198 So. at 569, there are exceptional cases when the before and after rule is not applicable. *See, e.g.*, Richardson v. Levee Comm'rs, 68 Miss. 539, 550, 9 So. 351, 352 (1891) (before and after rule not applicable to construction of levees).

One author has recently argued that the Mississippi courts merely pay lip service to the before and after rule while, in fact, using two separate standards for determining compensation in partial-take cases: "fair market value" and "indemnity." Jones, *Just Compensation Via Fair Market Value May Not Include the Kitchen Sink—It Could Be Noncompensable*, 46 MISS. L.J. 1, 1-2, 2 n.6 & 8 (1975).

[5] *See generally* MISS. CODE ANN. §§ 11-27-3 to 5 (1972) (defining eminent domain courts in Mississippi).

[6] Pearl River Valley Water Supply Dist. v. Wood, 252 Miss. 580, 595, 172 So. 2d 196, 202-03 (1965). In *Wood,* the condemnor contended the condemnee's land had been "taken" in 1959 since it had put a notice in a local newspaper of its intent to condemn certain land in Madison and adjacent counties and since it had put on exhibit a map showing the lands it expected to condemn for the project. *Id.* at 589, 172 So. 2d at 199. Between 1959 and 1964, when the case was tried, the condemnee's land had increased in value. *Id.* at 589, 172 So. 2d at 199-200. The condemnor sought to exclude evidence of the increase in the value of the condemnee's land, but the court held that since the condemnor was free to alter its plans as to the land to be taken after publishing preliminary plans, the condemnee's land was not actually "taken" until 1964, when suit to condemn the land was actually brought. *Id.* at 594-95, 172 So. 2d at 202-03; *accord,* Jackson Mun. Airport Auth. v. Wright, 232 So. 2d 709, 714 (Miss. 1970) (time of taking was date of filing of suit, not time of trial); Pearl River Valley Water Supply Dist. v. Brown, 254 Miss. 685, 692-93, 182 So. 2d 384, 385 (1966) (same); Mississippi State Highway Comm'n v. Stout, 242 Miss. 208, 214, 134 So. 2d 467, 470 (1961) (same); *cf.* Mississippi State Highway Comm'n v. Hemphill, 253 Miss. 507, 514-15, 176 So. 2d 282, 285 (1965) (decision reversed because damages assessed at time of trial (1964) rather than at time of taking by Highway Commission (1960)).

However, the condemnor does not have to have complete and definite plans prepared before eminent domain proceedings can begin. Pearl River Valley Water Supply Dist. v. Wood, 248 Miss. 748, 761, 160 So. 2d 917, 922 (1964).

[7] Between 1970 and 1976, the court decided at least 97 cases involving eminent domain questions. *See* Allen & Taylor, *Appeals to the Mississippi Supreme Court,* 48 MISS. L.J. 505, 581 (1977) (article provides table indicating frequency and types of cases handled by the court since 1970).

[8] 343 So. 2d 477 (Miss. 1977).

selling part of that land to Continental Oil Company and optioning another tract to Gulf Oil Company for service station sites. Appellant allegedly persuaded a third party, who had optioned a .14 acre strip of land to appellant, to deed this strip to the Highway Commission.[9] The Highway Commission later changed its plans, taking the land Continental Oil Company had purchased from appellant and condemning appellant's remaining 2.95 acres. Appellant contended that publication of the original plans and the deeding of the .14 acre strip was an "original taking" and that any taking necessitated by the change in plans amounted to "a second or supplemental taking."[10] The Mississippi court held that the publication of preliminary highway construction plans did not constitute a "taking"[11] and that there was no second or supplemental taking when the Highway Commission subsequently condemned land in addition to that originally scheduled for taking.[12]

The appellant wanted to establish the occurrence of a supplemental taking so that his compensation would be computed using the square footage price Continental was paid.[13] However, since the court found that there was no supplemental taking,[14] the "before and after" rule was applied as of the date of the filing of the suit by the Highway Commission.[15] Acknowledging that land value usually increases when a

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[9] Although it apparently would not have mattered in the ultimate outcome of the case, the court noted that the record was unclear as to whether the Commission ever actually recorded or accepted a conveyance of the .14 acre strip. *Id.* at 479 n.2.

[10] *Id.* at 479.

[11] *Id.* See note 6 and accompanying text *supra.*

[12] 343 So. 2d at 479. In Mississippi State Highway Comm'n v. Blackwell, 350 So. 2d 1325 (Miss. 1977), the Highway Commission, in 1958, purchased by warranty deed from appellee's predecessors in title, land creating a sight flare area. *Id.* at 1326. The Commission allowed appellees to continue to use the driveway access to the highway until 1974. *Id.* When the Commission barricaded this access, appellees contended they should be compensated for the loss of access. *Id.* The court held that they were not entitled to additional compensation from the Commission and did not acquire an easement by prescription. *Id.* at 1328.

[13] 343 So. 2d at 478.

[14] See note 12 and accompanying text *supra.*

[15] 343 So. 2d at 479. The Code provides that "[e]vidence of fair market value shall be established as of the date of the filing of the petition." MISS. CODE ANN. § 11-27-19 (1972). However, if an amended petition is filed, the date of filing of such amended petition is the date on which the value of the property is to be determined. Mississippi State Highway Comm'n v. Arndt, 304 So. 2d 281, 283 (Miss. 1974).

The purpose of the rule establishing the date of filing as the proper date for determining land value is to create a specific date for evaluation purposes and thereby add precision to the before and after rule applied on such cases. Mississippi State Highway Comm'n v. Frierson, 240 So. 2d 457, 459 (Miss. 1970). There are some cases, however, which are seemingly at variance with the rule. *See, e.g.,* Mississippi State Highway Comm'n v. Stout, 242 Miss. 208, 218, 134 So. 2d 467, 470 (1961) (court permitted testimony as to sale of lands near and similar to appellee's land even though the sale took place after petition new public project is announced,[16] the court refused to allow the appellant a windfall generated by his own speculation.[17]

The "before and after" rule was also applied in the context of inverse condemnation[18] in *Jackson Municipal Airport Authority v.*

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filed); Mississippi State Highway Comm'n v. Taylor, 237 Miss. 847, 851-52, 116 So. 2d 757, 760 (1959) (court held that lower court should have admitted testimony by condemnor as to what condemnee paid for land four years prior to condemnation proceedings); Louisville, N.O. & T. Ry. v. Hopson, 73 Miss. 773, 779, 19 So. 718, 719 (1896) (railroad appropriated land for its right of way without condemnation and seven years later brought condemnation proceedings; court held value of land to be computed as of the time of the original appropriation).

In still another context, the court has held that future damages which may accrue in relation to the condemned land are irrelevant in establishing present land value. McRaney v. Covington County, 210 Miss. 192, 195, 49 So. 2d 248, 250 (1951).

[16] 343 So. 2d at 479. Pearl River Valley Water Supply Dist. v. Brown, 254 Miss. 685, 182 So. 2d 384 (1966), is of special interest on this point. The facts in *Brown* were the same as those in Pearl River Valley Water Supply Dist. v. Wood, 252 Miss. 580, 172 So. 2d 196 (1965), *supra* note 6. The court in *Brown* agreed with the rule that general benefits and injuries which result from the use to which the land is to be put are not to be considered in awarding damages. 254 Miss. at 692-93, 182 So. 2d at 385. But the *Brown* court went on to hold that: "The agency exercising the extraordinary power of eminent domain cannot complain that the property has increased in value because of a proposed public project, until it actually files a petition to take the land by eminent domain proceedings." *Id.* at 693, 182 So. 2d at 836. The court concluded by saying that enhancement in the land's value prior to the taking may be claimed and shown by the landowner. *Id.* at 694, 182 So. 2d at 836. In Paulk v. Housing Auth., 204 So. 2d 153 (Miss. 1967), appellant's land, a slum area, was rezoned and restricted to commercial and light industrial use as a result of urban renewal plans approved by the Tupelo Housing Authority. *Id.* at 153. As a result of the rezoning, appellant's land was enhanced in value. *Id.* at 154. The Mississippi Supreme Court specifically held that he was entitled to the fair market value of his property on the date the condemnation suit was filed, including any enhancement in the value of his land as a result of the rezoning by the Housing Authority. *Id.*

The rule announced by the court in *Brown* and *Paulk* with regard to enhancement in value due to a proposed public improvement is not the majority position. *See generally* United States v. Miller, 317 U.S. 369, 377 (1943) (speculation arising from knowledge of public improvement not allowed to increase value for subsequent condemnations); 4 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 12.3151, at 12-293, 12-299 (rev. 3d ed. 1976) (enhancement in value spurred by anticipation of proposed improvement is generally excluded in calculating market value); Jones, *supra* note 4, at 12-13 (discussion of how *Brown* varies from *Miller*).

[17] 343 So. 2d at 481.

[18] Inverse condemnation is "a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the collecting agency." Thornburg v. Port of Portland, 376 P.2d 100, 101 n.1 (Or. 1962) (en banc). The only other Mississippi case found in which the court awarded damages against an airport authority based on an inverse condemnation theory was Jackson Mun. Airport Auth. v. Evans, 191 So. 2d 126 (Miss. 1966). The court in *Evans* relied on United States v. Causby, 328 U.S. 256 (1946), in finding that an airport authority zoning ordinance constituted a taking as to the owners' use and enjoyment of their land. 191 So. 2d

Wright.[19] In the first appearance of the case in 1970, the court stated that the taking occured upon filing suit, not at the time of the trial.[20] Last year the *Wright* case appeared for a third time.[21] The landowner contended that the Airport Authority, as owner of the aviation easement, was required to pay him additional damages because of increased flights and the introduction of heavier and louder aircraft after the easement was originally granted.[22] The court held that the landowner's compensation must be fixed as of the date the original suit was filed.[23]

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at 129. *See generally* Annot., 77 A.L.R.2d 1355 (1961) (when ground and flight operations of aircraft constitute a "taking"); Comment, *Airports: Remedies for the Adjacent Landowner*, 42 MISS. L.J. 504 (1971).

The inverse condemnation theory in *Wright* was based on MISS. CONST. art. 3, § 17, which states: "Private property shall not be taken or *damaged* for public use, except on due compensation being first made to the owner or owners thereof . . . ." (emphasis added). The Mississippi Supreme Court has not been entirely consistent in its application of this section of the constitution. *Compare* Jackson Mun. Airport Auth. v. Wright, 232 So. 2d 709, 710 (Miss. 1970) (damages allowed for taking for public use of the airspace superadjacent to plaintiff's land) *and* Smith v. Mississippi State Highway Comm'n, 183 Miss. 741, 747, 184 So. 814, 815 (1939) (diminution in the value of property abutting widened highway because of interference with ingress and egress may be damage within the meaning of § 17 of the Mississippi Constitution) *with* Mississippi State Highway Comm'n v. Hurst, 349 So. 2d 545, 546 (Miss. 1977) (damages sustained by the construction of a median and other damages for inconvenience from increased noise and air pollution were general to neighborhood and not specific to landowner) *and* Quin v. Mississippi State Highway Comm'n, 194 Miss. 411, 427, 11 So. 2d 810, 814 (1943) (court acknowledged that an actual taking was not necessary for relief under § 17 but said that the mere fact that landowner's home and premises were left off new paved highway does not in itself afford a legal basis for recovery of damages).

[19] 344 So. 2d 471 (Miss. 1977).

[20] Jackson Mun. Airport Auth. v. Wright, 232 So. 2d 709, 714 (Miss. 1970).

[21] In Wright v. Jackson Mun. Airport Auth., 300 So. 2d 805 (Miss. 1974), the second appearance of the case, the court reversed a chancellor's determination that because the landowner, after the first remand, sold part of the land to the Mississippi State Highway Commission and the airport acquired the balance of her property by condemnation, the landowner was not entitled to be paid compensation for the aviation easement. *Id.* at 810.

[22] 344 So. 2d at 472. The general rule is that once an easement is established by agreement of the parties, it cannot subsequently be changed by either the dominant or the servient tenant without the consent of the other. *See, e.g.,* Capital Elec. Power Ass'n v. Hinson, 226 Miss. 450, 461, 84 So. 2d 409, 412 (1956) (owner of a general right-of-way for transmission lines cannot extend or add to the lines, once placed, without the landowner's consent); *cf.* Lindsey v. Shaw, 210 Miss. 333, 339, 49 So. 2d 580, 584 (1951) (owner of prescriptive easement may not extend it beyond such width as is reasonably necessary for the purpose for which it was acquired). *See generally* 27 MISS. L.J. 239 (1956) (casenote discussing general rule).

[23] 344 So. 2d at 473. The court was relying primarily upon the decision in Mississippi State Highway Comm'n v. Tomlinson, 23 Miss. 623, 78 So. 2d 797 (1955). In that case, the Highway Commission acquired an easement over Tomlinson's land, and later sought to raise the grade of the highway. Tomlinson sought to recover damages because of the increased height of the grade. The court ruled that the Commission had not taken addi-

Thus, the landowner in a condemnation suit is limited to recovery, in one proceeding, of all damages which have resulted or which are reasonably likely to result because of the easement's utilization for its intended purpose.[24]

B. Proof of Fair Market Value and the "Before and After" Rule

In an eminent domain suit in Mississippi, an offer to purchase property is not admissible as evidence of value.[25] Last year, in *Mississippi State Highway Commission v. Robertson,*[26] the court ruled that while options or offers to purchase are not competent evidence to establish fair market value, the probative effect of such evidence is not destroyed if the condemnor fails to object when the testimony is offered at trial.[27] The landowner in *Robertson* also argued that he should receive special damages based on the devaluation of the property resulting from the impossibility of its further use as a convenience store location. The *Robertson* court recognized, however, that the property involved could still be used for other commercial purposes after the taking and thus applied the general rule that "[t]he test of market value is not the property's value for a special purpose, but its fair market value in view of all the purposes to which it is naturally adapted."[28] The court then held the loss of use as a convenience store was not a special item of damage, but only one of the factors to be considered in determining the value of the property after the taking.[29]

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tional land, but by merely changing the grade, was using the easement for the purpose for which it was acquired. *Id.* at 629, 78 So. 2d at 799; *accord,* Miller v. Ervin, 192 Miss. 712, 717, 6 So. 2d 910, 911 (1942) (compensation paid for acquisition of right-of-way by railroad may cover damages caused to adjoining land); Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 868, 198 So. 565, 570 (1940) (any damages caused by the proper use of land taken has been accounted for in the compensation paid).

[24] 344 So. 2d at 473.

[25] State Highway Comm'n v. Johnson, 186 Miss. 889, 892, 191 So. 820, 821 (1939). *But cf.* Gowan v. State Highway Comm'n, 193 Miss. 365, 368, 9 So. 2d 637, 637 (1942) (price paid for same land by owner is admissible to show value of land if time of purchase was recent enough to aid in determination of present value); Levee Comm'rs v. Nelms, 82 Miss. 416, 420, 34 So. 149, 150 (1903) (price paid at voluntary sale of neighboring land similar to land taken is admissible as independent evidence of value of land taken).

The Mississippi position as announced in *Johnson* is the rule in most jurisdictions in the United States. 4 J. SACKMAN, *supra* note 16, § 12.311[2], at 12-118 to -121.

[26] 350 So. 2d 1348 (Miss. 1977).

[27] *Id.* at 1350.

[28] *Id.* at 1352.

[29] *Id.; accord,* Mississippi State Highway Comm'n v. Gipson, 240 So. 2d 620, 621-22 (Miss. 1970) (special damages arising from close proximity of highway to home must be considered when determining market value and not as separate item of compensation); *cf.* Mississippi State Highway Comm'n v. Ladner, 243 Miss. 139, 143-46, 137 So. 2d 791, 792-93 (1962) (evidence that a profitable dairy business was being ruined because of

C. *Procedure*

During 1977, the court considered procedural aspects of the Mississippi "quick take" law,[30] and the Relocation Assistance Law.[31] The court also addressed the problem of determining who are necessary parties to a condemnor's appeal of an eminent domain judgment, and the allocation of those parties' respective rights.

In 1972 the Mississippi legislature recognized that in view of the state's contractual obligations, the prohibition against a condemnor's possession of condemned property before a final judgment was no longer feasible. As a result, the legislature enacted an "immediate possession" or "quick take" statute.[32] Under this statute, the condemnor may, after filing the condemnation petition with the circuit clerk and depositing eighty-five percent of the appraised property value with the court, take possession of the condemned land prior to final judgment.[33] The condemnee is allowed to withdraw the deposit from the court at any time.[34]

In *Mississippi State Highway Commission v. Prescott,*[35] the 1977 supreme court faced the problem of statutory interpretation created when a jury awards damages less than the eighty-five percent deposit. In *Prescott,* the requisite deposit was filed with the court by the Highway Commission on December 28, 1973. Judgment was entered on February 8, 1974 on a jury verdict totalling less than the deposit. In January of 1975, the commission filed a petition to enroll a judgment against the

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condemnation held inadmissible; court said question to be determined is the before and after value of the lands and not the business operated on them); State Highway Comm'n v. Chatham, 143 Miss. 427, 433-35, 161 So. 674, 675-76 (1935) (although several witnesses testified that value of residential property not condemned was lessened in value by highway, court refused to award consequential damages merely because of increased traffic on highway); Board of Levee Comm'rs v. Hendricks, 77 Miss. 483, 486, 27 So. 613, 614 (1900) (testimony concerning profits derived from business conducted on condemned property inadmissible). *But see* Mississippi State Highway Comm'n v. McArn, 246 So. 2d 512, 515 (Miss. 1971) (if taking affects fair market value of the remaining property, it should be considered in the before and after formula); Mississippi State Highway Comm'n v. Colonial Inn, 246 Miss. 422, 432, 149 So. 2d 851, 855 (1963) (same).

[30] MISS. CODE ANN. §§ 11-27-81 to -91 (Supp. 1977).

[31] *Id.* §§ 43-39-1 to -27.

[32] 1972 Miss. Laws ch. 489, *codified in* MISS. CODE ANN. §§ 11-27-81 to -91 (Supp. 1977). *See generally* Comment, *Mississippi Eminent Domain Law,* 44 MISS. L.J. 692, 713-14 (1973) (discussing enactment of "quick take" statutes).

[33] MISS. CODE ANN §§ 11-27-83 to -85 (Supp. 1977).

[34] *Id.* § 11-27-89 provides:

> The making of a deposit by the petitioner or the withdrawal of said deposit by the defendant or defendants shall not prejudice the right of any party to a trial by jury in the special court of eminent domain to determine the fair market value of the property to be condemned and the damages, if any, to the remainder if less than the whole is taken . . . .

[35] 346 So. 2d 924 (Miss. 1977).

condemnee for the difference between the deposit and the jury verdict.[36] Upholding the lower court's denial of the petition, the *Prescott* court held that since the court of eminent domain is a special court,[37] its existence is extinguished automatically upon entry of final judgment, and the court thereafter is without jurisdiction to determine any matters regarding the case.[38]

Justice Robertson, in a concurring opinion,[39] noted that while the result reached by the *Prescott* majority was proper, the landowner has a responsibility under the statute to pay the condemnor the difference between the eighty-five percent deposit and the jury verdict.[40] He also stated that, in circumstances where the jury award is less than the deposit and the condemnor fails to file a motion to recover the difference before final judgment, the condemnor's remedy should be a separate suit against the condemnee.[41] Justice Robertson placed ultimate responsibility on the attorneys for the litigants to prepare and present "a proper and comprehensive judgment" and on the trial judge to render a judgment complete in every respect.[42]

Prescott illustrates the recent conclusion of one commentator that while the "quick take" law is an improvement over the old eminent domain procedure, it also has significant flaws.[43] Although many of the weaknesses in the law concern possible misuse by the condemnor,[44] the decision in *Prescott* indicates that administrative agencies are not the only possible abusers. Justice Robertson's comments concerning the responsibilities of the attorneys and the trial judge[45] are well taken. The use of extreme care by the condemnor's attorney regarding the final judgment signed by the trial judge is the best method available for preventing the condemnor, and, ultimately, the taxpayer, from having to shoulder the expense of recovering the difference in the deposit and the jury verdict from the condemnee in a separate suit.[46]

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[36] *Id.* at 925.

[37] MISS. CODE ANN. § 11-27-3 (1972).

[38] 346 So. 2d at 925; *see, e.g.,* Mississippi State Highway Comm'n v. First Methodist Church, 323 So. 2d 92, 95 (Miss. 1975) (denial of motion for new trial filed after date of final judgment upheld); Mississippi State Highway Comm'n v. Taylor, 293 So. 2d 9, 12 (Miss. 1974) (bill of exceptions filed almost a month after date of judgment held not reviewable).

[39] 346 So. 2d at 926 (Robertson, J., specially concurring).

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] See Comment, *supra* note 32, at 719.

[44] *Id.*

[45] 346 So. 2d at 926 (Robertson, J., specially concurring).

[46] The applicable Mississippi statute provides that if the deposit exceeds the judgment, the defendant shall pay the excess to the petitioner. MISS. CODE ANN. § 11-27-29

In another statutorily created procedure, the Mississippi legislature recognized the necessity for the fair and equitable treatment of those displaced by the acquisition of private property for federally funded projects.[47] With the enactment of the Relocation Assistance Law,[48] the condemnor is required to make "additional payment not in excess of fifteen thousand dollars to any displaced person who is displaced from a dwelling actually owned and occupied by the displaced person."[49] Furthermore, the Act provides that if the landowner is unsatisfied with the offered amount of assistance, he may seek review through the appropriate administrative agency.[50] The Act also provides judicial review for the landowner if he is unsatisfied by a final administrative determination.[51] However, nothing in the Relocation Assistance Act is to be construed as creating, in any condemnation proceedings, any element of damages not in existence prior to the passage of the Act in 1972.[52] Thus, in *Mississippi State Highway Commission v. Waller*[53] the supreme court held that since the cost of obtaining replacement housing was not a

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(1972). But another statute, a part of the "quick take" law enacted by the legislature in 1972, seems almost to encourage the condemnee *not* to repay the difference when the jury verdict is less than the amount deposited with the court clerk (and withdrawn by the condemnee). See *id.* § 11-27-87 (Supp. 1977) which provides:

> If the petitioner takes possession of the land condemned and the amount of compensation as determined upon final disposition of the case is in excess of the amount of the deposit, the *petitioner shall pay interest to the owner at the rate of eight percent (8%)* per annum upon the amount of such excess from the date of the filing of the petition *until payment is actually made.* If the petitioner takes possession of the land condemned and the amount of the compensation as determined upon final disposition of the case is less than the amount of the deposit, *the petitioner shall be entitled to a personal judgment against the owner for the amount of the difference.*

(emphases added). Florida, on the other hand, imposes a lien on all the condemnee's property except his homestead when the amount withdrawn from the court by the condemnee exceeds the jury verdict. FLA. STAT. ANN. § 74.071 (West Supp. 1976).

[47] MISS. CODE ANN. § 43-39-3 (Supp. 1977).

[48] 1972 Miss. Laws ch. 526, *codified in* MISS. CODE ANN. §§ 43-39-1 to -27 (Supp. 1977). See Jones, *supra* note 4, at 6-8.

[49] MISS. CODE ANN. § 43-39-9 (Supp. 1977).

[50] *Id.* § 43-39-17.

[51] *Id.* § 43-39-25.

[52] *Id.* § 43-39-27. In Mississippi State Highway Comm'n v. Rives, 271 So. 2d 725 (Miss. 1972), the court construed this statute and held that since evidence of the relocation cost of personal property was an element of damages in an eminent domain proceeding prior to the passage of the Relocation Assistance Law, it would be a proper element of damages in an eminent domain suit begun after the passage of the Act. *Id.* at 728.

The court in *Rives* relied on Mississippi State Highway Comm'n v. McArn, 246 So. 2d 512 (Miss. 1971). *McArn,* decided before the Relocation Assistance Law was passed, held that the expense incurred by a condemnee in removing personal property was a consequence of the taking, and was, therefore, an element of the damage. *Id.* at 514.

[53] 353 So. 2d 755 (Miss. 1977).

recognized element of damage in eminent domain proceedings prior to 1972, it cannot be considered a proper element of damage in an eminent domain suit instituted after the passage of the Act.[54] The condemnee's proper remedy is through the appropriate administrative agency, with judicial review for the landowner available only after his exhaustion of administrative remedies.[55]

Also among the procedural aspects of eminent domain litigation covered by the 1977 court was the determination of the necessary parties to suits involving condemnation of land whose ownership is divided into more than one estate and the proper apportionment of damages where land encumbered by a leasehold estate is condemned. In Mississippi, when an eminent domain suit involves the taking of different interests or estates, the "unit rule" is applied to ascertain compensation for the entire property and then apportion it among the parties according to their respective rights.[56] Last year, in *Lennep v. Mississippi State Highway Commission,*[57] the court used the "unit rule" as the basis for dismissing the commission's cross-appeal against certain lessees who had appealed their award in an eminent domain suit brought by the commission.[58] The lessor had not appealed, and the commission cross-appealed only in regard to the lessees' award. The lessees voluntarily dismissed their appeal, and the court then dismissed the cross-appeal of the condemnor.[59] The *Lennep* court reasoned that since the lessor and lessees in an eminent domain proceeding were "inextricably bound each to the other,"[60] any change in the amount apportioned to one would necessarily affect the apportionment of the other.[61] Thus, both lessor and lessee must be made parties to an appeal that challenges the award of either.

The *Lennep* majority opinion was met with a forceful dissent[62] stressing the practical effect of the decision. Justice Gillespie, writing for the dissenters, stated that as a result of *Lennep* landowners in future condemnation suits involving leasehold interests will be forced to endure needless expense since neither the lessor nor the lessee will be able to singularly manage the lawsuit or unilaterally settle without a trial.[63] The *Lennep* dissenters criticized the majority for incorporating "the unit valuation method into an end itself that will result in hardship and needless expense to landowners under circumstances that are likely to arise from time to time."[64] The majority's reasoning concerning the "inextricably bound" lessee and lessor[65] seems particularly applicable to the situation in *Lennep* since the lessee was not appealing the verdict, and the commission was appealing only the lessee's award.[66] If the commission had been permitted to appeal the lessee's award only, the lessor's award would have been affected in his absence.[67] Thus, the court's refusal to allow the appeal was equitable under the circumstances and comports with the requirements of due process.

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[54] *Id.* at 758.

[55] *Id.* Specifically, the court said replacement housing damages is an administrative matter and "shall in no wise be an issue in an eminent domain trial." *Id.*

[56] Lee v. Indian Creek Drainage Dist., 246 Miss. 254, 263-64, 148 So. 2d 663, 666 (1963).

[57] 347 So. 2d 341 (Miss. 1977).

[58] *Id.* at 344; *cf.* Board of Levee Comm'rs v. Johnson, 66 Miss. 248, 257, 6 So. 199, 201 (1889) (court required condemnor to pay for tenant's crop, although it had already paid the landlord the value of the crop at the time the land was condemned; tenant should have been made a party to original proceedings).

[59] 347 So. 2d at 344.

[60] *Id.* (quoting State Road Dep't v. Hartsfield, 216 So. 2d 61, 66 (Fla. Dist. Ct. App. 1968)).

[61] 347 So. 2d at 344.

[62] Chief Justice Gillespie wrote the dissenting opinion and was joined by Justices Walker and Lee. *Id.* at 347 (Gillespie, C.J., dissenting).

II. CONCURRENT OWNERSHIP

A. *Ouster of a Cotenant*

Historically, the Mississippi cases concerning ouster and adverse possession between cotenants have been somewhat confused.[68] It has long been recognized that a tenant in common cannot gain title by adverse possession against his cotenants "until they have actual notice of the adverse claim or knowledge of such facts as are tantamount thereto."[69] But early in this century, it was held that the occupying cotenant's executing and recording a deed conveying fee simple title to himself constituted actual notice to the world of his claim.[70] This doctrine was strongly criticized[71] and was finally overturned in 1954.[72] Later, however, the court modified the rule by holding that where one or more cotenants convey to a third party an instrument granting fee simple title to the entire property, the remaining cotenants are ousted[73] if the grantee properly records his deed and enters into possession asserting open and exclusive ownership of the property. The cotenants not participating in the conveyance are deemed to be ousted, and at the end of the statutory period for adverse possession, title is vested in the grantee.

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[63] *Id.* The dissent argued that the case was controlled by two recent Mississippi decisions. In the first, Seago Enterprises, Inc. v. Mississippi State Highway Comm'n, 330 So. 2d 588 (Miss. 1976), the trial court refused to allow the lessee to join in the statement of values submitted by the landowner. The supreme court reversed citing the rule that a single award of damages would be apportioned among the owners of the various interests in the land according to their separate interests. *Id.* at 590. The court, however, went on to say:

> Inasmuch as [the lessee] appealed only as to the State Highway Commission, the judgment of the Special Court of Eminent Domain has become final as to the landowners, and [the landowners] are not parties to nor will they be affected by this decision.
>
> Accordingly, the judgment of the Special Court of Eminent Domain is reversed as to [the lessee] only and this case is remanded for a new trial against the State Highway Commission only.

Id.

In the second case, Mississippi State Highway Comm'n v. Aultman, 336 So. 2d 1325 (Miss. 1976), the condemnor appealed as to the lessee, but paid off the landowner and the sublessee. The right of the condemnor to appeal without making the owner and sublessee parties was not assigned as error on appeal. *Id.* at 1327.

[64] 347 So. 2d at 347 (Gillespie, C.J., dissenting).

[65] See note 60 and accompanying text *supra.*

[66] The majority in *Lennep* stated that to permit the Highway Commission to appeal as to the lessee only would violate the lessor's due process rights. 347 So. 2d at 347.

[67] The majority held that the condemnor's complaint "must go against the total award of damages because the condemnor can obtain relief under Mississippi procedure only by reducing the total award of damages." *Id.* at 346.

[68] For an extensive analysis of these cases, see 42 MISS. L.J. 137 (1971).

The issue of the rights of cotenants in possession and their grantees who seek to gain title by adverse possession was considered by the court last term in *Steele v. Mack.*[74] In *Steele,* Marie Steele and her mother-in-law, Stella Kelley, purchased a sixteen-acre tract of land as tenants in common in 1945. After Mrs. Steele and her husband were divorced in 1949, Mrs. Steele never lived on the land again. In 1962, Mrs. Kelley conveyed two one-acre lots of the land to third parties. In 1974, Mrs. Steele petitioned the chancery court to partition the entire sixteen-acre tract.[75] The heirs and assigns of Mrs. Kelley contended they had established title to the land by adverse possession.[76] The Mississippi Supreme Court noted, however, that an effective ouster was not established by the mere fact that Mrs. Steele abandoned the property at the time of the divorce in 1949.[77] Finding that Mrs. Steele did not have actual notice or the equivalent of actual notice of a claim,[78] the court granted partition of the fourteen acres remaining after the one-acre lots were conveyed by Mrs. Kelley.[79] However, title to the two one-acre lots deeded by Mrs. Kelley in 1962 was held to be in Mrs. Kelley's grantee[80] since he had recorded his deed and had adversely possessed the lot for the period required by statute.[81] The decision in *Steele* must be seen as an extension of the previously announced rule[82] in at least one important respect. Until *Steele,* conveyance of the entire property to the grantee of the possessing cotenant was an essential element of the ouster rule.[83] Although only part of the land was conveyed by the possessing cotenants,[84] the *Steele* court still permitted the grantee to possess adversely against the nonoccupying cotenant.[85] The *Steele* result can be viewed then as a logical extension of the rule and as indicative of a policy which seeks to increase reliance on the recording act.

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[69] Peeples v. Boykin, 132 Miss. 359, 369, 96 So. 177, 178 (1923); *see* Hurst v. J.M. Griffin & Sons, Inc., 209 Miss. 381, 387, 46 So. 2d 440, 442 (1950) ("[O]uster of the other cotenant must have arisen from actual knowledge or as is sometimes vaguely expressed, by acts equivalent thereto . . . . The testimony of such knowledge by the other tenants in common must be clear and convincing.").

The basic reason for the requirement of notice is that cotenants stand in a fiduciary relationship to each other, and from this relationship a presumption arises that the acts of a cotenant in possession are for the benefit of, and not contrary to, the interests of the other cotenants. Bayless v. Alexander, 345 So. 2d 17, 20 (Miss. 1971); Quates v. Griffin, 239 So. 2d 803, 809 (Miss. 1970); Nichols v. Gaddis & McLaurin, Inc., 222 Miss. 207, 221, 75 So. 2d 625, 629 (1954).

[70] Peeples v. Boykin, 132 Miss. 359, 369-70, 96 So. 177, 178-79 (1923).

[71] *See, e.g.,* McDonald v. Robertson, 204 Miss. 737, 757, 38 So. 2d 189, 190 (1948) (tenants in common found to have had actual knowledge of deed thus *Peeples* was not needed to support holding); Note, *Adverse Possession of a Cotenant Against a Cotenant in Mississippi,* 21 Miss. L.J. 147, 151-52 (1949) (when *Peeples* was decided there was no precedent which supported it).

[72] Nichols v. Gaddis & McLaurin, Inc., 222 Miss. 207, 231-32, 75 So. 2d 625, 633-34 (1954). *See generally* 27 Miss. L.J. 172 (1955).

[73] Quates v. Griffin, 239 So. 2d 803, 811 (Miss. 1970); *accord,* Hardy v. Lynch, 258 So. 2d 414, 416 (Miss. 1972) (conveyance of fee simple and recording without grantee being physically present for entire period was sufficient to constitute notice by other cotenants). *See also* Key v. Wise, 341 So. 2d 1326, 1327 (Miss. 1977) (rule in *Quates* applied in simple adverse possession case apparently involving no cotenancy issue).

[74] 341 So. 2d 1322 (Miss. 1977).

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[75] *Id.* at 1323.

[76] *Id.* at 1323-24.

[77] *Id.* at 1324; *cf.* Hemphill v. Willis, 300 So. 2d 458, 459-60 (Miss. 1974) (fact that cotenants farmed, fenced, leased and paid taxes on land not sufficiently clear and convincing to overcome presumption that occupancy was for benefit of all cotenants); Kennedy v. Bryant, 252 So. 2d 784, 786, 788 (Miss. 1971) (no ouster where cotenant paid taxes on land for fifteen years, had land surveyed, and sold some timber off land); Gavin v. Hosey, 230 So. 2d 570, 572 (Miss. 1970) (no ouster where one cotenant purchased common property at tax sale and rented land for twenty-two years). *But cf.* Stampley v. Green, 251 Miss. 47, 51, 168 So. 2d 300, 301 (1964) (adverse possession by ouster established where, for statutory period, cotenant paid taxes on land, rented it, sold timber off of it, retained all rents and profits as his own, and held himself out as owner).

[78] 341 So. 2d at 1324. The court has, in suits by cotenants seeking to confirm title by adverse possession through ouster, more often than not, found that actual notice or the equivalent of actual notice did not exist. *See, e.g.,* Barber v. McManus, 205 So. 2d 653, 655 (Miss. 1968) (recording of tax deed); Guiseppe v. Cozzani, 193 So. 2d 549, 554 (Miss. 1966) (filing of pleadings in chancery clerk's office); Hurst v. J.M. Griffin & Sons, 209 Miss. 381, 389, 47 So. 2d 811, 811 (1950) (quitclaim deed by one cotenant did not impart constructive notice to his cotenants that he was asserting the unconditional ownership of the entire property). The court has on occasion found that actual notice or its equivalent was given. *See, e.g.,* Hardy v. Lynch, 258 So. 2d 414, 417 (Miss. 1972) (recording of a deed by grantee of a cotenant); Avera v. Turner Lumber Co., 230 Miss. 123, 130, 92 So. 2d 458, 460 (1957) (grantee of cotenant fenced land, paid taxes on it, and cut timber off of it; ousted cotenants came back and forth to father's homestead just across highway from land for eighteen years without asserting any claim).

[79] 341 So. 2d at 1325.

[80] Only one of the 1962 grantees was joined as a party to the suit. *Id.*

[81] *Id.* The court relied on the rule announced in Quates v. Griffin, 239 So. 2d 803 (Miss. 1970). See note 73 and accompanying text *supra.*

[82] See note 73 and accompanying test *supra.*

[83] The rule provides that "[t]o oust the cotenants not joining in the deed these factors must concur, (1) the execution of the deed purporting to convey the *entire interest* in fee simple to one then a stranger to the title." Quates v. Griffin, 239 So. 2d 803, 812 (Miss. 1970) (emphasis added).

B. Partition

In Mississippi, partition is an absolute right of a cotenant, regardless of the inconvenience suffered by other cotenants.[86] Last year, in *Blackmon v. Blackmon,*[87] the Mississippi court applied this rule in a partition action involving divorced spouses who had been cotenants before their divorce.[88] In the divorce proceeding, the wife had been given exclusive use of the house owned by the couple as tenants in common.[89] The court held that the divorce decree did not work to defeat the former wife's absolute right of partition since the decree did not create a homestead right in either of the former spouses which could prevent a partition of the property.[90]

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[84] See note 75 and accompanying text *supra.*

[85] See notes 80 through 81 and accompanying text *supra.*

[86] Barnes v. Rogers, 206 Miss. 887, 893, 41 So. 2d 58, 60 (1949); *see* MISS. CODE ANN. § 11-21-3 (1972) ("[A]ny person owning an indefeasible fee simple title to an undivided interest in land may procure a partition . . . ."). The Mississippi rule is in accord with the generally accepted view: *E.g.,* Batson v. Graham, 236 Ala. 72, 181 So. 260, 263 (1938); Condrey v. Condrey, 92 So. 2d 423, 426 (Fla. 1957). This was also the rule at common law since 1539. W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 101 (3d ed. 1965); 4A R. POWELL, THE LAW OF REAL PROPERTY ¶ 609, at 635 (1977).

[87] 350 So. 2d 44 (Miss. 1977).

[88] *Id.* at 45. *Blackmon* dealt with partition by a divorced couple of property owned by them as tenants in common. The same result would be reached if the Blackmons had been joint tenants with the right of survivorship. MISS. CODE ANN. § 11-21-3 (1972). Property owned by husband and wife as tenants by the entirety apparently cannot be partitioned until they are divorced. Coleman v. Jackson, 286 F.2d 98, 99 (D.C. Cir. 1960), *cert. denied,* 366 U.S. 933 (1961). *See generally* Annot., 132 A.L.R. 630, 631 (1941) (collection of cases dealing with this topic). Upon divorce, the common law concept of spousal unity is destroyed, and the parties are transformed from tenants by the entirety to tenants in common. 4A R. POWELL, *supra* note 86, ¶ 624, at 709. *Contra,* Shepard v. Shepard, 336 So. 2d 497, 499 (Miss. 1976) (tenancy by entirety becomes joint tenancy with right of survivorship upon divorce).

[89] 350 So. 2d at 45.

[90] *Id.* at 45-46. The court held that since the husband had lost his right to use the house, he had lost his homestead rights as well. *Id.* at 46; *see* May v. May, 229 Miss. 97, 104-05, 90 So. 2d 169, 171 (1956) (where husband deeded his interest in homestead property to his wife, in consideration of not pursuing divorce action, the deed validly divested husband of any interest in the property).

The court refused to apply MISS. CODE ANN. § 91-1-23 (1972), which exempts from partition, without her consent, homestead property occupied by a widow. Neither spouse in *Blackmon* was dead and the court held the statute inapplicable. 350 So. 2d at 47. *See*

The right of partition may be exercised by various methods. Although a partition of lands by sale is permitted in Mississippi,[91] partition in kind has been the favored method of dividing jointly owned land.[92] Last term, in *Burley v. Kuykendall*,[93] the supreme court affirmed this policy by holding that the party seeking partition by sale has the burden of "proving clearly" that a division in kind cannot equitably be made.[94] The court's disregard of the chancery court's finding that the land was not susceptible to partition in kind was "beyond comprehension" to the dissenters[95] and may indicate that the test for "proving clearly" the impossibility of partition in kind will be a rigorous one.

III. OIL AND GAS

A. *Nature of Interest in Minerals*

While in oil and gas law the difference between a mineral interest and a royalty interest is settled, the determination of which interest is reserved in an ambiguous instrument is often a difficult problem of construction.[96] Both interests can be created by grant, reservation, or exception. The difference between the two is that a mineral interest usually authorizes its owner to go on the property to prospect, sever, and remove the minerals, while the owner of a royalty interest does not have a right to go upon the property, but rather has a right to a share

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generally Montgomery, *A Review of the Mississippi Cases on Homestead Law*, 16 MISS. L.J. 249 (1944) (dealing with conveying of homestead property and need for other spouse's joinder, and rights of cotenants to partition such property subject to a widow's interest); 31 MISS. L.J. 308 (1960) (same); Note, 22 MISS. L.J. 65 (1950) (same).

[91] MISS. CODE ANN. § 11-21-11 (1972); *cf.* Cox v. Kyle, 75 Miss. 667, 669-70, 23 So. 518, 519 (1898) (partition by sale is an innovation on the common law and must be strictly construed).

[92] *E.g.*, Mathis v. Quick, 271 So. 2d 294, 296 (Miss. 1973) (quoting Dailey v. Houston, 246 Miss. 667, 683, 151 So. 2d 919, 926 (1926)); Shorter v. Lesser, 98 Miss. 706, 711-12, 54 So. 155, 156 (1911); Cox v. Kyle, 75 Miss. 667, 669-70, 23 So. 518, 519 (1898).

One author believes that most modern courts usually pay only lip service to the idea that partition in kind is preferred to partition by sale. He acknowledges, however, that his conclusion is unsupported by any statistical data. 4A R. POWELL, *supra* note 86, ¶ 612, at 652.

[93] 349 So. 2d 1036 (Miss. 1977).

[94] *Id.* at 1037-38. This holding is in accord with the court's position in a number of earlier cases. *E.g.*, Wright v. Ingram-Day Lumber Co., 195 Miss. 823, 825-26, 17 So. 2d 196, 197 (1944); Hogue v. Armstrong, 159 Miss. 875, 881, 132 So. 446, 448 (1931); Hilbun v. Hilbun, 134 Miss. 235, 238, 98 So. 593, 594 (1924).

[95] 349 So. 2d at 1038. In a dissent by Justice Walker, the majority was criticized for sifting through "the cold-typewritten pages of testimony, disregarding some testimony and giving greater weight to different portions of other testimony and evidence than did the chancellor." *Id.* at 1039 (Walker, J., dissenting).

[96] *E.g.*, Mounger v. Pittman, 235 Miss. 85, 86-87, 108 So. 2d 565, 566 (1959); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW §§ 202.2-3, at 302-04 (1975).

of the severed minerals or proceeds from their sale.[97]

In *Clark v. Carter,*[98] the 1977 Mississippi Supreme Court faced the construction of a printed form entitled "Mineral Right and Royalty Transfer."[99] The form, executed by illiterate grantors, contained a typewritten intention clause referring to a royalty transfer.[100] At the same time, the grantors executed an oil, gas, and mineral lease to the grantee. After oil was discovered on the land, the grantee argued that the form was a mineral deed, regardless of the intent provision to the contrary.[101] The *Clark* court noted, however, that if the instrument were intended to be a mineral conveyance, the intent provision would be superfluous since the grantee would own all royalty through ownership of the minerals.[102] Similarly, the lease would be unnecessary because a mineral conveyance would have vested in the grantee the rights the lease conveyed.[103] In holding that the instrument reserved a royalty interest, the court stated that while ambiguous contract terms are usually "construed more strongly against the grantor or maker . . . [104] it is also an established principle of law that [ambiguous] terms are construed more strongly against the party preparing the instrument."[105]

The court also focused last year on the related matter of construing an instrument allegedly reserving[106] a royalty interest.[107] In *Day v. Gibralter Oil Corp.,*[108] Day acquired by warranty deed in 1928 a one-half interest in the oil, gas, and minerals under a tract of land. He recorded the deed in book 8, page 325 of the chancery clerk's records. He simultaneously acquired an oil, gas, and mineral lease on the same land. The lease, which provided for specific royalties, expired in 1932. In 1938, Day quitclaimed to another party all of his interest in the oil, gas, and mineral rights, "except [his] oil and gas royalty found in Lease Record 8, page 325."[109] The court decided that the reservation was not void for uncertainty,[110] ruling that the grantor had reserved a royalty interest under any future lease.[111] Rejecting the grantee's contention that the reservation was limited to the specific royalties provided in the 1928 lease,[112] the *Day* court held that since the lease had expired in 1932, the reservation could only have been meant to apply to future leases.[113]

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[97] 31 MISS. L.J. 107, 109 (1959) (noting *Mounger v. Pittman* and discussing use of extrinsic evidence to resolve ambiguities in such instrument). *See also* Blass & Richey, *An Analysis of the Rights and Duties of the Holder of the Executive Right*, 41 MISS. L.J. 189, 191-93 (1970).

[98] 351 So. 2d 1333 (Miss. 1977).

[99] *Id.* at 1333-34. The entire form is reprinted in an appendix to the opinion. *Id.* at 1336-38.

[100] The provision stated, "It is the intention of the grantors to convey by this instrument to the grantee, a transfer of all royalty owned by us to all minerals in, on, or under all land owned by us in Jasper County, Mississippi." *Id.* at 1334.

[101] *Id.* The grantee-lessee relied on Ford v. Jones, 226 Miss. 716, 85 So. 2d 215 (1956), where a similar intention clause was written in after the description of the lands involved. The court in *Ford* found the instrument to be a conveyance of minerals. The court in *Clark* distinguished *Ford* on two grounds: in *Ford* there was no oil, gas, and mineral lease executed simultaneously with the Form R-101, and in *Ford* the grantors were not "illiterate and unlearned." 351 So. 2d at 1335.

[102] 351 So. 2d at 1335. *See generally* 1 WILLIAMS & MEYERS, *supra* note 96, at § 301 (defining and analyzing terms covering conveyances and interests created thereby).

[103] 351 So. 2d at 1335; *see* 1 WILLIAMS & MEYERS, *supra* note 96, at § 202.2 (setting out development and executive rights of mineral interests).

[104] 351 So. 2d at 1336; *e.g.,* Love Petroleum Co. v. Atlanta Oil Producing Co., 169 Miss. 259, 260, 152 So. 829, 831 (1934).

[105] 351 So. 2d at 1336; *accord,* Stampley v. Gilbert, 332 So. 2d 61, 63 (Miss. 1976) (involving lease of decedent's home and applying the rule). Where the language in the instrument is vague or ambiguous, the court will look at conditions surrounding the parties at the time the instrument was executed and construe the instrument most strongly against the party who prepared it. *See, e.g.,* Sumpter Lumber Co. v. Skipper, 183 Miss. 595, 608-09, 184 So. 296, 298-99 (1938) (construing a timber contract).

B. *Damages to the Surface Estate by the Lessee*

Where an unintentional trespasser removes marketable trees, the measure of damages to the owner is the value of the timber at the time and place of the wrong.[114] Last year, in *Texas Pacific Oil Co. v. Holder,*[115] the court applied this general rule in a situation where the owner cut the timber himself because of the representation of his lessee that a well would be drilled at a particular location.[116] The lessees informed the

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[106] A royalty interest may be created by reservation. 1 WILLIAMS & MEYERS, *supra* note 96, at § 202.3.

[107] Creation of a royalty interest by reservation is not unusual. *Id. See generally* Ewing, *Reservation and Exception of Minerals in Mississippi Conveyancing,* 39 MISS. L.J. 39 (1967).

[108] 344 So. 2d 474 (Miss. 1977).

[109] *Id.* at 474-75.

[110] *Id.* at 475; *cf.* Armstrong v. Bell, 199 Miss. 29, 33, 24 So. 2d 10, 11 (1945) (ambiguity as to whether reservation in deed was of royalty or mineral interest). *See also* 344 So. 2d at 477-78 (Smith, J., dissenting) (where there is ambiguity in the exception, the exception, not the deed, is void for uncertainty and the intent of the parties must be gathered from the instrument itself); Ates v. Ates, 189 Miss. 226, 231, 196 So. 243, 245 (1940) (exception in deed held void for uncertainty); McAllister v. Honea, 71 Miss. 256, 259, 14 So. 264, 264 (1894) (where exception in deed held void for uncertainty, grantee is party to benefit from defect).

[111] 344 So. 2d at 476.

[112] See note 109 and accompanying text *supra.*

[113] 344 So. 2d at 476.

[114] Chevron Oil Co. v. Snellgrove, 253 Miss. 356, 364, 175 So. 2d 471, 474 (1965); Day v. Hamilton, 237 Miss. 472, 476, 115 So. 2d 300, 302 (1959).

[115] 346 So. 2d 374 (Miss. 1974).

[116] *Id.* at 375. *See generally* Decell, *The Measure of Damages for Trespassory Production of Oil and Gas in Mississippi,* 23 MISS. L.J. 101 (1952).

In general, a lessee of an oil and gas lease has the right to possess the surface to the lessor-owner that they planned to drill on a certain section of the owner's tract. The owner cleared the area of timber, which would have matured in 1984. After the lessees failed to drill, the owner sued them for damages equal to the value the timber would have had in 1984.[117] The court found, however, that the owner had not lost the full value of the trees, but only the value represented by several years growth. The damages beyond the fair market value of the immature timber and the costs of reseeding the area were deemed excessive by the court.[118]

IV. CONVEYANCES

If, in a conveyance, there exists a fiduciary relationship[119] between

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extent reasonably necessary to enable him to perform the obligations imposed on him by the lease. 4 W. SUMMERS, THE LAW OF OIL AND GAS § 652 (1938). In Union Producing Co. v. Pittman, 245 Miss. 427, 146 So. 2d 553 (1962), the court agreed with the general rule that an oil and gas lease carries with it the rights to possess the surface to the extent necessary to perform the lessee's obligations under the lease, but rejected the notion that the question of what is a reasonable use of the premises is a matter of which the lessee alone can be the judge. *Id.* at 434, 146 So. 2d at 555. The court said that whether the use of the surface premises is reasonable is a question of fact, and that while the lessee may use as much of the surface as may be reasonably necessary, he cannot use the land in an unreasonable, oppressive or capricious manner. *Id.* at 434, 146 So. 2d at 555-56; *accord,* Central Oil Co. v. Shows, 246 Miss. 300, 308, 149 So. 2d 306, 310 (owner of oil and mineral rights in the land has the right "of entering, occupying, and making such use of the surface lands as is reasonably necessary in exploring, mining, removing, and marketing the minerals."). *See generally* 4 W. SUMMERS, *supra,* § 652 at 2-4; Comment, *Use of the Surface Fee by the Mineral Operator,* 32 MISS. L.J. 104 (1960).

The most common reason for lessors to bring suits against their lessees for damage to the surface seems to be for the escape of salt water and waste oil over the surface of the land and into fresh water supplies. *See, e.g.,* Gulf Ref. Co. v. Davis, 224 Miss. 464, 470-71, 80 So. 2d 467, 469 (1955) (lessee not liable for damages caused by digging salt water disposal pits, but was liable for damage to vegetation and surface caused by salt water escaping from pits).

[117] 346 So. 2d at 375.

[118] *Id.; accord,* 1 WILLIAMS & MEYERS, *supra* note 96, § 218.10 at 237 ("Damages for destruction of a crop is the value of the unmatured crop at the time of injury."); *see* Southland Co. v. Aaron, 221 Miss. 59, 75, 72 So. 161, 167 (1954) (measure of damages for injury caused by pollution if injury resulting is temporary or abatable is the depreciation in the rental value of the property caused by the pollution); Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 866, 198 So. 565, 569 (1940) (analogous formula applied in eminent domain cases). *See generally* Graves, *Proof of Damages to Property in Tort Actions,* 33 MISS. L.J. 151 (1962).

The court in *Holder* seemed to treat the trees almost like crops. This reasoning has been followed in cases outside Mississippi. *See, e.g.,* Pinkerton v. Crail, 113 Cal. App. 484, 298 P. 532, 533 (1931) (lessee held liable for removal of orange trees where oil and gas lease expressly provided for payment by lessee of a specific sum for each orange tree removed); Superior Oil Co. v. Griffin, 357 P.2d 987, 991 (Okla. 1960) (lessee liable for removal of native pecan trees which had been pruned and otherwise cared for by lessor; trees treated as "growing crops" within the lease terms).

[119] The courts prefer to describe a fiduciary relationship rather than define it. In Ham

grantor and grantee, a presumption of invalidity arises,[120] which may be rebutted by the grantee.[121] In order to sustain the conveyance, the grantee must make a clear showing of good faith in his conduct and full knowledge and independent consent and action on the grantor's part.[122]

Last year, in *Mansell v. Gross,*[123] the supreme court applied this rule. A ninety-four-year-old unmarried hospital patient deeded land to his nephew under circumstances in which the uncle received no independent counsel.[124] The court reaffirmed the generally accepted Mississippi rule,[125] holding that the grantee failed to meet the burden of prov-

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v. Ham, 146 Miss. 161, 110 So. 583 (1926), the court quoted Pomeroy to the effect that "[A] fiduciary relation . . . [is one] in which there is confidence reposed on one side, and the resulting superiority and influence on the other. The relation and duties involved in it need not be legal, it may be moral, social, domestic, or merely personal." *Id.* at 173, 110 So. at 584 (quoting 2 POMEROY, EQUITY JURISPRUDENCE § 956 (4th ed. 1918)).

[120] Ham v. Ham, 146 Miss. 161, 172-73, 110 So. 583, 584-85 (1926); *see* Kemp v. Kemp, 253 So. 2d 876, 876 (Miss. 1971) (court upheld cancellation of deed of real property worth $35,000 by 77-year-old widow to her late husband's nephew for a consideration of $10.00 and some past favors of no particular monetary value); 38 MISS. L.J. 156, 160-64 (1966) ("mere existence of a confidential relationship is not an absolute bar to transactions between parties to it, [but] it does call for scrutiny by the courts."); *cf.* Brooks v. Brooks, 145 Miss. 845, 850, 111 So. 376, 377 (1927) (conveyance from illiterate father to son set aside); Webb v. Webb, 99 Miss. 234, 240, 54 So. 840, 841 (1911) (conveyance from illiterate parents to son); Clark v. Lopez, 75 Miss. 932, 936, 23 So. 648, 649 (1898) (fraud inferred where grantor is of weak mind and needy and consideration paid for property is grossly inadequate). *But see* Cunningham v. Lockett, 216 Miss. 879, 885, 63 So. 2d 401, 403 (1953) (consanguinity alone not sufficient to furnish basis for fiduciary relationship so as to render deed to person cccupying such position invalid for undue influence); Gillis v. Smith, 114 Miss. 665, 677, 75 So. 451, 453 (1917) (influence not undue which arises out of sympathy, kindness, attention, attachment, affection, esteem or flattery); Burnett v. Smith, 93 Miss. 566, 571, 47 So. 117, 118 (1908) (deed will not be set aside on ground of undue influence unless influence took away free agency of grantor). *See generally* 42 MISS. L.J. 146 (1971).

[121] Ham v. Ham, 146 Miss. 161, 173, 110 So. 583, 584-85 (1926); *cf.* Croft v. Alder, 236 Miss. 713, 722-27, 733-34, 115 So. 2d 683, 686-88, 691 (1959) (*Ham* test extended to testamentary transfer); Bourn v. Bourn, 163 Miss. 71, 79, 140 So. 518, 521 (1932) (son failed to overcome presumption in deed to him from his mother).

[122] The normal method for showing independent consent and action is by showing that when he made the conveyance, the grantor was acting on the advice of a competent person devoted entirely to the grantor's interest. Ham v. Ham, 146 Miss. 161, 174, 110 So. 583, 584-85 (1926). *But see* Manning v. Hammond, 234 Miss. 299, 304, 106 So. 2d 51, 53 (Miss. 1958) (deed not cancelled where proof showed that idea of conveying land originated in mind of grantor, that he was acting independently and of his own free will, and that he was the "dominant spirit" in the transaction); Jones v. Singley, 242 So. 2d 430, 437 (Miss. 1970) (presumption overcome through testimony of disinterested witnesses as to grantor's mental alertness and competency to conduct business).

[123] 345 So. 2d 1315 (Miss. 1977).

[124] *Id.* at 1316. See note 123 *supra.*

[125] See notes 119 through 122 and accompanying text *supra.*

ing that the grantor was free from undue influence.[126] The court thus seems inclined to apply the rule strictly that a conveyance made in the context of a fiduciary relationship raises the presumption of undue influence.[127]

In another case involving the conveyance of certain property, *Avera v. Avera,*[128] the court applied the principle that land cannot be conveyed by a reservation[129] in a deed.[130] In *Avera,* two brothers, Richmond and Alex Avera, conveyed their interest in a certain tract of land to their mother with a provision in the deed that upon the mother's death, title in the land would revert to Alex.[131] Before her death, however, the mother conveyed part of the land by warranty deed to Richmond. Upon the mother's death, Alex claimed fee simple ownership of the land deeded by himself and Richmond to their mother.[132] The court held that only the portion originally owned by Alex reverted to him. Alex was not a grantee in the deed, and since there were no words in the deed from Richmond to his mother that could be said to convey her a life estate with the remainder in Alex, the clause in the deed concerning the disposition of the property was not binding on the mother and did not affect Richmond's interest.[133]

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[126] 345 So. 2d at 1317.

[127] *Id.* See notes 119 through 122 and accompanying text *supra.*

[128] 341 So. 2d 654 (Miss. 1977).

[129] "A reservation is of something taken back out of that which was clearly granted." Thornhill v. Ford, 213 Miss. 49, 63, 56 So. 2d 23, 29 (1952). The terms "reservation" and "exception" are often used interchangeably, Cook v. Farley, 195 Miss. 638, 652, 15 So. 2d 352, 356 (1943), but there was a difference, however slight, at common law. Thornhill v. Ford, 213 Miss. 49, 63, 56 So. 2d 23, 29 (1952).

[130] 341 So. 2d at 655-56; *accord,* Cook v. Farley, 195 Miss. 638, 651, 150 So. 2d 352, 355 (1943); Barataria Canning Co. v. Ott, 84 Miss. 737, 756, 37 So. 121, 125 (1904) (holding that the reservation of an exclusive right to water or fish was not a thing which would otherwise have passed under the deed and was therefore inoperative).

[131] The relevant clause provided, "This deed is made with full knowledge and understanding with all the parties concerned that at the death of Mrs. Nora B. Avera, title to the above described land will revert to Alex Sharp Avera." 341 So. 2d at 654.

[132] *Id.* at 654-55. Alex relied on Avant v. Wells, 244 So. 2d 398 (Miss. 1971). The court in *Avera* distinguished *Avant* on the ground that in *Avant* the grantor clearly intended to convey to his wife a life estate and vest the remainder in his niece and nephew. 341 So. 2d at 655.

[133] 341 So. 2d at 655-56. An instrument purporting to be a deed but which has no named grantee is void. Parsons v. Marshall, 243 Miss. 719, 727-28, 139 So. 2d 833, 837 (1962). Also, in order to effect transfer of title, the instrument must contain apt words of grant, which demonstrate the grantor's intent to convey land by deed as distinguished from an intention to convey land at some future date. Cook v. Farley, 195 Miss. 638, 651, 15 So. 2d 352, 355 (1943).

V. CONSTRUCTION LIENS

Section 85-7-131 of the Mississippi Code provides that persons performing construction or repair services may obtain a lien on the property on which the structure in question is located.[134] A construction lien, however, arises only where the work is contracted for by the owner or a person "authorized, either expressly or impliedly, by the owner."[135] Enforcement of the lien is limited to the building repaired or constructed, unless the work is done with the owner's written consent.[136]

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[134] MISS. CODE ANN. § 85-7-131 (1972). *But see* Jay Indus., Inc. v. Powell, 220 Miss. 372, 379, 71 So. 2d 193, 196 (1959)(where awning erected at lessee's request, without lessor's consent, any lien arising therefrom pertains only to the awning, not to the land or building). *See generally* Brown, *Mechanic's Liens: An Interpretation of Section 356 As Amended,* 37 MISS. L.J. 203 (1966); Comment, *Mississippi Law Governing Private Construction Contracts: Some Problems and Proposals,* 47 MISS. L.J. 437 (1976).

[135] MISS. CODE ANN. § 85-7-135 (1972); *see* Burwell v. Planters' Lumber Co., 220 Miss. 79, 84, 70 So. 2d 71, 73 (1954) (where lessors at least impliedly authorized repairs and construction of new building, resulting liens extended to and covered entire lot on which buildings stood and entire curtilage); Wenger v. First Nat'l Bank, 174 Miss. 311, 318-19, 164 So. 229, 230-31 (1935) (laborers and materialmen who contracted with lessee not entitled to recover where there was no express or implied obligation on part of the owner to pay the claims).

[136] Chears Floor & Screen Co. v. Gidden, 159 Miss. 288, 298, 131 So. 426, 428 (1930); Fairbank Co. v. Briley, 25 So. 354, 354 (Miss. 1899); MISS. CODE ANN. § 85-7-137 (1972).

The two key cases construing this statute have focused on whether a lien may be impressed on land owned by a wife when the husband contracted to have construction done on the land. In Planters' Lumber Co. v. Tompkins, 111 Miss. 307, 71 So. 565 (1916), the husband purchased lumber from appellant which was used in the repair and construction of the house he and his wife lived in. *Id.* at 308, 71 So. at 566. The wife owned the land and house. After the husband failed to pay for the lumber, appellant sought to enforce a lien on the house. The court held that appellant could enforce its lien against the house but not the land. *Id.* at 310, 71 So. at 566.

Tompkins was apparently overruled in Chears Floor & Screen Co. v. Gidden, 159 Miss. 288, 131 So. 426 (1930). In *Gidden,* the materials and labor furnished by the appellant went into a new residence being built on a lot owned by the wife of the husband who contracted to have the appellant furnish and install doors, windows and window screens. *Id.* at 292, 131 So. at 426. The court construed the statute so as to permit a lien on the entire house only if the entire house (or building) was constructed by a person contracted with by one other than the owner of the land. *Id.* at 297, 131 So. at 428. If the contractor had only added on a room to an existing structure, as was the case in *Tompkins,* that part of the structure alone is subject to the lien, provided it can be detached and removed from the original building without injury to the latter. *Id.* at 297, 131 So. at 428. If, however, anything less than the whole building is constructed at the instance of a person other than the landowner, and the separation and removal of the structure, whether it is an addition to the building, fixtures, or repairs, cannot be accomplished without injury to the original building, the lien does not attach to either the complete building or any additions to it. *Id.* at 297-98, 131 So. at 428.

Chief Justice Smith concurred in *Gidden* but disagreed with the court's limitation on the scope of the lien. *Id.* at 298, 131 So. at 429 (Smith, C.J., concurring). He argued that the husband was not an "other person" within the meaning of the statute and that

Last year, in *Brown v. Gravlee Lumber Co.,*[137] the court, analyzing the statutes, reasoned that no construction lien could attach to the entire property of a lessor absent his written authorization, even though the lessee was the lessor's daughter.[138] In *Brown,* a contractor sought to enforce a lien against property owned by the lessee's parents.[139] Although the lessors had given their implied authorization for the performance of certain repair work,[140] the court held that the construction lien could only attach to the improvements that could be separated without damaging the lessor's interest in the house, since the lessors failed to give their written consent for the work to be done.[141]

The *Brown* court's ruling was proper in light of the statutes.[142] Since the contractor could have protected himself by checking the title to the lot before agreeing to perform the work, the decision is just.[143] Also, the contractor was allowed to impose a construction lien on those improvements he made on the house that could be removed without damaging the lessor's interest in the house.[144] While the legislature's intent is clearly to protect the workman who might otherwise go uncompensated for his work,[145] the holding recognizes that the owner should also be

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the lien should apply to the entire building even though the husband may have repaired only part of it. *Id.* at 299-300, 131 So. at 429-30 (Smith, C.J., concurring).

In a special concurrence Justice Cook noted the practical problems faced by the laborers and materialmen under the majority's rationale:

> Under this view a wife desiring to construct a house upon land owned by her could utilize labor contracted for and material purchased by her husband to the extent of 75 per cent—or any other per cent less than 100—of the total cost of labor and material necessary to complete the house, and there would be no lien thereon, and laborers and materialmen would be without remedy in the event the husband refused to pay . . . for the reason that it would be manifestly impossible to separate and remove without injury to the original structure, the value of the labor and any substantial part of the material that had been worked into and become a part of the completed house or building.

Id. at 302, 131 So. at 430 (Cook, J., specially concurring). In both *Gidden* and *Tompkins,* the wife apparently had actual notice of what the husband was doing. Chears Floor & Screen Co. v. Gidden, 159 Miss. 288, 292, 131 So. 426, 426 (1930); Planters' Lumber Co. v. Tompkins, 111 Miss. 307, 308, 71 So. 565, 566 (1916).

[137] 341 So. 2d 907 (Miss. 1977).

[138] *Id.* at 913.

[139] *Id.* at 908.

[140] *Id.* at 910.

[141] *Id.* at 913. See note 136 and accompanying text *supra.*

[142] See notes 134 through 136 and accompanying text *supra.*

[143] 341 So. 2d at 913.

[144] *Id.* at 913.

[145] *See* Sharpe v. Spengler, 48 Miss. 360, 363 (1873) (liberal construction of statute favored so as to effect the "ends of justice"); Jones v. Alexander, 18 Miss. (10 S. & M.) 627, 629-30 (1848) (statute gives preference only to those mechanics coming within its purview); Buck v. Brian, 3 Miss. (2 Howard) 874, 876 (1838) (tracing the legislative history of the statute through 1838).

afforded protection from the careless contractor who agrees to perform work for insolvent tenants.[146]

There was also a decision last year that is of great moment to construction lenders. As a general rule, to maintain priority over construction liens, a lender advancing construction funds must use reasonable diligence to ensure that the funds are actually used in payment of materials or other construction costs.[147] In *Cook v. Citizens Savings & Loan Association,*[148] the court applied this rule[149] in a situation where a lender failed to exercise the requisite diligence in distributing the loan proceeds to the owner.[150] The owner, who had not used the money to pay the contractor, defaulted on the loan, forcing the lender to foreclose on the deed of trust.[151] When the property was sold, both the lender and the purchaser of the property knew that the contractor had not been paid for the labor and materials used in the construction of the building on the property in question.[152] In a suit by the contractor to enforce a lien against the property, the court held that since the lender failed to inquire of the owner whether the loan proceeds had been used to pay for labor and materials, the contractor's lien would be allowed to attach to the funds realized from the foreclosure sale.[153]

Whether *Cook* should govern all construction loans is questionable since it is somewhat excessive to require lenders who have loaned a small amount to comport with the due diligence standard.[154] The "reasonable diligence" standards,[155] reaffirmed by the court in *Cook,*[156] clearly apply to all lenders and illustrate that construction lenders cannot depend on filing their deeds of trust before the construction lien of a contractor or subcontrator in order to maintain priority.[157] The *Cook* case in essence can be seen as a result of the courts' tendency to construe lien statutes strictly in favor of the materialmen and laborers.[158]

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[146] 341 So. 2d at 910.

[147] Southern Life Ins. Co. v. Pollard Appliance Co., 247 Miss. 211, 221, 150 So. 2d 416, 420 (1963); First Nat'l Bank v. Virden, 208 Miss. 679, 685, 45 So. 2d 268, 270-71 (1950). *See generally* MISS. CODE ANN. § 85-7-131 (1972) (general mechanics' lien statute).

In Wortman & Mann, Inc. v. Frierson Bldg. Supply Co., 184 So. 2d 857 (Miss. 1966), the court found that the lender had met the *Pollard* test of "reasonable diligence." *Id.* at 860-61. The attorney for the title insurance company in *Wortman & Mann* required the contractor to give them an affidavit for materials and labor each time they delivered loan proceeds to him. *Id.* at 861.

[148] 346 So. 2d 370 (Miss. 1977).

[149] See note 147 and accompanying text *supra.*

[150] 346 So. 2d at 371.

[151] *Id.*

[152] *Id.*

[153] *Id.* at 372.

[154] See note 147 *supra.*

[155] See note 147 and accompanying text *supra.*

[156] 346 So. 2d at 372.

[157] See note 147 and accompanying text *supra.*

VI. CONCLUSION

Few changes in Mississippi property law occurred in 1977. The court construed the "quick take" eminent domain statute to limit the condemnor's recovery. At present the condemnor, failing to file a motion to recover from the condemnee the difference between the deposit and the actual award before final judgment is rendered, must seek relief in a separate suit against the condemnee.[159] The court also limited the application of the new Relocation Assistance Law by requiring exhaustion of administrative remedies by the landowner seeking replacement housing relief.[160]

For the most part, the court merely reaffirmed or extended existing law. For example, while the court seemingly liberalized the rule regarding ouster of a cotenant,[161] the decision last year allowing the grantee of only a portion of a tract of land to acquire title by adverse possession evidences a logical extension of the rule's existing rationale.[162]

With affluence[163] and industrialization[164] increasing in Mississippi, new issues in property law will inevitably arise. In dealing with these new areas of law, the Mississippi Supreme Court might consider the words of Professor Cribbet:

> Balanced precariously on a feudal base, our land law . . . must slough off its archaic rules after they have served their purpose and we, as lawyers, must be alert to new social needs and aspirations.
>
> . . . .
>
> Most legal principles are founded on reason, but it may be the reason of history, not the logic of the present. In property law, these reasons tend to run more deeply into the past than elsewhere and we must be careful not to disrupt a viable institution when we sever a particularly

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[158] *See* Southern Life Ins. Co. v. Pollard Appliance Co., 247 Miss. 211, 221, 150 So. 2d 416, 420 (1963). *See generally* Comment, *supra* note 134, at 447 (discussing lender's burden).

[159] Mississippi State Highway Comm'n v. Prescott, 346 So. 2d 924, 925 (Miss. 1977). See notes 35 through 46 and accompanying text *supra.*

[160] Mississippi State Highway Comm'n v. Waller, 353 So. 2d 755, 758 (Miss. 1977). See notes 53 through 55 and accompanying text *supra.*

[161] Steele v. Mack, 341 So. 2d 1322, 1325 (Miss. 1977). See notes 74 through 85 and accompanying text *supra.*

[162] See notes 68 through 73 and accompanying text *supra.*

[163] Between 1966 and 1974, per capita income in Mississippi increased from $1852 to $3804. MISSISSIPPI STATISTICAL ABSTRACT 200 (1976).

[164] In 1975, during the peak of the recent recession, there were over 10,600 new jobs provided by new and expanded industries in the state. *Id.* at 223.

noxious root. Research and planning should precede reform so that all change is responsible change, paying respect to our great traditions of the past as we move into the future.[165]

Moran McLelland Pope, III

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[165] J. CRIBBETT, PRINCIPLES OF THE LAW OF PROPERTY 339 (1962).

TORTS

Last year, the Mississippi Supreme Court decided twenty-one tort cases, five of which have been chosen for commentary because of the significant impact they have on Mississippi tort law.[1] The supreme court proceeded with caution into such diverse areas of tort law as negligence,[2] contributory negligence,[3] products liability,[4] defamation,[5] and governmental immunity.[6] Dominated by automobile accident cases,[7] the decisions selected for discussion indicate an attempt by the Mississippi judiciary to limit liability.

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[1] Tort cases decided in 1977 but not discussed textually include: Cole v. Todd, 355 So. 2d 292, 294-95 (Miss. 1977) (jury verdict for appellee driver reversed since no evidence contradicted appellee's statement that she had hit a pedestrian, and since motorists owe duty of reasonable care to pedestrians); Boler v. Mosby, 352 So. 2d 1320, 1323 (Miss. 1977) (in common law action for slander, accusing a person of being a thief is actionable per se); Wood v. Walley, 352 So. 2d 1083, 1086-87 (Miss. 1977) (appellee who struck appellant's automobile from behind was not entitled to a sudden emergency instruction on the grounds that a third driver failed to comply with a traffic officer's command); Banes v. Thompson, 352 So. 2d 812, 814 (Miss. 1977) (jury verdict for appellee driver reversed and remanded because injured passenger who was not negligent in an avoidable accident was entitled to a verdict); NAACP v. Moody, 350 So. 2d 1365, 1369 (Miss. 1977) (jury verdict for appellee highway patrolman in a libel and slander action reversed since appellee failed to prove actual malice as required of a public figure); Bush Constr. Co. v. Blakeney, 350 So. 2d 1370, 1373 (Miss. 1977) (appellee not entitled to recovery where highway construction company met its duty by placing warning signs, and appellee had knowledge of repairs, but proceeded in a dangerous manner); City of Jackson v. Sullivan, 349 So. 2d 527, 529 (Miss. 1977) (verdict for injured appellee reversed since appellee had been negligent in not determining, as required by MISS. CODE ANN. § 63-3-603 (1972), that the left lane was clear before changing lanes); Harkins v. Paschall, 348 So. 2d 1019, 1024 (Miss. 1977) (jury verdict for appellee who was injured when his automobile was struck from the rear by appellant's truck affirmed); Tallahatchie Valley Elec. Power Ass'n v. Clinton, 347 So. 2d 348, 351 (Miss. 1977) (jury verdict for appellee for decedent's wrongful death by electrocution reversed because of negligence of decedent, who had been repeatedly warned of the danger); Crocker v. Sears, Roebuck & Co., 346 So. 2d 921, 924 (Miss. 1977) (affirming directed verdict for appellee-seller in suit for fire damages allegedly caused by a defective stove, since evidence revealed several possible causes for the fire); Engineering Serv. Co. v. Minor, 346 So. 2d 916, 918 (Miss. 1977) (affirming jury verdict for appellee who was injured when she tripped over surveyor's tape stretched over her mother's porch); Rolph v. Board of Trustees, 346 So. 2d 377, 379 (Miss. 1977) (house bill providing immunity for county hospital held to be special legislation violative of MISS. CONST. art. 4, § 87); Warren v. Allgood, 344 So. 2d 151, 153 (Miss. 1977) (jury verdict for appellee who was injured in rear-end collision affirmed on condition of appellant's acceptance of additur); James Reeves, Inc. v. Chain, 343 So. 2d 1229, 1232-33 (Miss. 1977) (jury verdict for appellee affirmed on condition that appellee accept a remittitur since jury verdict was so excessive as to evidence passion, bias, and prejudice); Hartford Steam Boiler Inspection & Ins. Co. v. Cooper, 341 So. 2d 665, 667-68 (Miss. 1977) (reversing jury verdict for appellee claiming injury due to insurance company's failure to inspect machinery, since appellant had no duty to inspect, and since appellee's employer did not rely upon appellant's inspections); Dickerson Constr. Co. v. Process Eng'r Co., 341 So. 2d 646, 653 (Miss. 1977) (suit against architect-engineer and construction company for damages to a building caused by expanding clay decided on contract grounds).

I. AUTOMOBILE ACCIDENT CASES

A. *Res Ipsa Loquitur*

The doctrine of res ipsa loquitur—"the thing speaks for itself"— is a form of circumstantial evidence from which negligence may be inferred.[9] As a general rule, four conditions must be met before the doctrine will be held to apply: (1) the accident must be such that it does not ordinarily occur unless there has been negligence on the part of someone; (2) the instrumentality causing injury must have been in the exclusive control of the defendant; (3) there must be no contributory negligence on the plaintiff's part; and (4) knowledge of the cause of the injury must be more readily accessible to the defendant.[10] The doctrine, which has previously been applied in several areas,[11] was considered by the 1977 court in the context of one-car automobile accidents.[12]

In *Barnes v. Taylor,*[13] appellant, administratrix of a child's estate, brought an action in the Circuit Court of Washington County against appellee, administrator of the child's grandmother's estate, seeking damages for the death of the child.[14] The bodies of both decedents and the car in which they had been riding were found in a bayou four days after an unexplained one-car accident.[15] Since there was no eyewitness to the incident, the trial court directed a verdict for appellee. On appeal, appellant argued that res ipsa loquitur applied, and that the physical facts together with reasonable inferences therefrom created a jury question of liability. Rejecting this contention, the supreme court held that res ipsa loquitur should not be applied when the injury complained of might have been caused by the concurrent negligence of two or more persons or causes, one of which was outside the defendant's control, since a jury verdict for the plaintiff under these circumstances could only result from surmise, speculation, or conjecture.[16]

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[2] Mercy Regional Medical Center v. Doiron, 348 So. 2d 243 (Miss. 1977).

[3] Tallahatchie Valley Elec. Power Ass'n v. Clinton, 347 So. 2d 348 (Miss. 1977).

[4] Crocker v. Sears, Roebuck & Co., 346 So. 2d 921 (Miss. 1977).

[5] Boler v. Mosby, 352 So. 2d 1320 (Miss. 1977); NAACP v. Moody, 350 So. 2d 1365 (Miss. 1977).

[6] Berry v. Hinds County, 344 So. 2d 146 (Miss.), *cert. denied,* 98 S. Ct. 114 (1977).

[7] Of twenty-one total cases, eleven involved automobile accidents. *See* cases cited note 1 *supra.*

[8] W. PROSSER, HANDBOOK OF THE LAW OF TORTS 213 (4th ed. 1971).

[9] Waddle v. Sutherland, 156 Miss. 540, 549, 126 So. 201, 203 (1930).

[10] Clark v. Vardaman Mfg. Co., 249 Miss. 42, 44-45, 162 So. 2d 857, 858 (1964) (citing 38 AM. JUR. *Negligence* § 295 (1941)); Palmer v. Clarksdale Hosp., 206 Miss. 680, 694, 40 So. 2d 582, 584 (1949) (citing Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687, 689 (1944)); 18 MISS. L.J. 448, 448 (1947). *See generally* W. PROSSER, *supra* note 8, at 211-28; Malone, *Torts and Negligence,* 11 MISS. L.J. 76, 78-79 (1938); Witherspoon, *What Care is Required of a Carrier by Air?,* 17 MISS. L.J. 221, 224-27 (1945).

[11] For other applications of the doctrine, see Grey v. Hayes-Sammons Chem. Co., 310 F.2d 291, 302-03 (5th Cir. 1962) (crop damages allegedly caused by harmful herbicide); Johnson v. Coca-Cola Bottling Co., 239 Miss. 759, 773-74, 125 So. 2d 537, 543 (1960) (exploding soft drink bottle); Palmer v. Clarksdale Hosp., 206 Miss. 680, 696-97, 40 So. 2d 582, 585 (1949) (injury from medical treatment); J.C. Penney Co. v. Evans, 172 Miss. 900, 904, 160 So. 779, 780 (1935) (falling metal from merchant's carrier system).

[12] The court formerly applied the doctrine of res ipsa loquitur to a one-car accident case in Johnson v. Foster, 202 So. 2d 520 (Miss. 1967). See notes 17 & 18 and accompanying text *infra.*

[13] 347 So. 2d 972 (Miss. 1977).

The court's refusal to apply the doctrine in *Barnes* is in accord with its often repeated statement that res ipsa loquitur should be strictly limited and cautiously applied;[17] nonetheless, the court's failure to apply the doctrine was somewhat unexpected in light of a 1967 one-car accident case, where res ipsa was held applicable.[18] However, the court found the situation in *Barnes* to be distinguishable insofar as the evidence in the earlier decision negated negligence on the part of any other person.[19] The court in the 1967 decision, noting the good physical health of the driver and good condition of the vehicle involved, held that the evidence precluded any causal connection between the accident and any other thing.[20] In *Barnes,* the court held the evidence lacking in that it failed to prove (1) the driver's physical condition, (2) the mechanical condition of the vehicle, (3) the cause of death of either decedent, (4) whether other people or objects were involved, and (5) who was driving the car.[21] It is apparent, based on the dictates of *Barnes,* that these five elements of proof must now be considered necessary to a successful plea of res ipsa loquitur in one-car accident cases. They are supplemental to the traditional requirements[22] for application of the doctrine and would seem to require eyewitness testimony[23] and an autopsy[24] in almost every conceivable case.[25] As a result, these new standards substantially limit res ipsa loquitur as applied to one-car accidents. The *Barnes* decision should prove helpful, however, since plaintiffs' attorneys will know that they must meet a substantial burden of proof in order to convince the court to apply res ipsa loquitur in one-car accident cases. The *Barnes* requirements, read in conjunction with the traditional requirements, provide guidelines about the quantum of proof necessary to sustain a plea of res ipsa loquitur.

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[14] *Id.* at 972. Grandmother and grandson were last seen alive when they left a fishing party at Jackson Lake in Washington County to go to Rolling Fork to procure an inspection sticker for the grandmother's car. *Id.* at 973.

[15] *Id.*

[16] *Id.* at 973-74.

[17] Clark v. Vardaman Mfg. Co., 249 Miss. 42, 44, 162 So. 2d 857, 858 (1964); *accord,* Sanders v. Smith, 200 Miss. 551, 561, 27 So. 2d 889, 892 (1946); J.C. Penney Co. v. Evans, 172 Miss. 900, 905, 160 So. 779, 780 (1935).

[18] Johnson v. Foster, 202 So. 2d 520 (Miss. 1967). In *Johnson,* plaintiff's decedent, a passenger in a car driven by defendant's decedent, was killed when the car left the highway and struck a culvert. *Id.* at 521-22.

[19] 347 So. 2d at 974. Evidence in *Johnson* also indicated that the highway was paved and straight, and the weather was clear and dry. 202 So. 2d at 523. Eyewitness testimony in *Johnson* negated the possibility that any other vehicle or object was involved in the accident. *Id.* at 522.

[20] 347 So. 2d at 974.

[21] *Id.*

B. Negligence per se

Negligence per se is defined as the violation of a statute designed to protect a class of persons, of which the plaintiff is a member, against the type of harm which resulted from the violation.[26] Application of this doctrine effectively "[stamps] the defendant's conduct as negligence, but with no greater effect."[27] The rule as applied in Mississippi played a determinative role in two 1977 supreme court cases. Relying on a 1963 decision,[28] the court in *Illinois Central Gulf R.R. v. Stedman*[29] held that a Mississippi statute[30] regulating the speed of locomotives in cities and towns applies only to steam locomotives.[31] The court recognized the fixing of speed limits for trains to be within the province of the legislature.[32] Because the legislature had not amended the statute since the court's 1963 ruling,[33] the court felt that it would be improper to fix the speed limit for other locomotives.[34]

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[22] See note 10 and accompanying text *supra.*

[23] The fourth of the new requisites requires the plaintiff to show whether other people or objects were involved. This would seem to require eyewitness testimony. See text accompanying note 21 *supra.*

[24] The third of the new requirements is that the plaintiff must prove the cause of death. See *id.*

[25] The court's opinion leaves unclear the quantum of proof necessary to prove the following requirements: (1) driver's physical condition, (2) mechanical condition of the vehicle, and (3) who was driving the car. *See* 347 So. 2d at 974.

[26] W. PROSSER, *supra* note 8, at 200; *see* U-Haul Co. v. White, 232 So. 2d 705, 708 (Miss. 1970) (holding that violation of a statute requiring trailers being towed on public highways to be equipped with safety chains constitutes negligence as a matter of law); Nobles v. Unruh, 198 So. 2d 245, 247 (Miss. 1967) (violation of a statute governing the changing of lanes by motor vehicles is negligence per se). *See generally* Comment, *Violation of Highway Statutes as Negligence in Mississippi*, 13 MISS. L.J. 248, 248-50 (1941).

[27] W. PROSSER, *supra* note 8, at 200.

[28] New Orleans & N.E.R.R. v. Burney, 248 Miss. 290, 159 So. 2d 85 (1963). In *Burney* the court ruled that Miss. Code § 7782 (1942), the predecessor of MISS. CODE ANN. § 77-9-237 (1972), applied expressly and exclusively to trains operated by the dangerous agency of steam. 248 Miss. at 308, 159 So. 2d at 94. *But cf.* Illinois Cent. R.R. v. Pilgrim, 220 So. 2d 598, 600 (Miss. 1969) (even though the statute technically does not cover the speed of diesel trains, it does set forth the legislature's judgment as to a safe running speed for trains through cities and towns).

[29] 344 So. 2d 468 (Miss. 1977). In *Stedman,* appellee's decedent was killed when his truck collided with appellant's train. The jury returned a verdict for appellee, but the

The dictates of common sense indicate the need for a statewide law regulating the speed of trains through cities and towns.[35] However, the *Stedman* court, by excluding from section 29-9-237 of the Mississippi Code all locomotives other than the obsolete steam locomotive, has left the state without the necessary law. It is hoped that the Mississippi legislature will be moved to amend this antiquated statute. The desired result could be obtained by striking out the words "by steam" which appear three times within the statute.[36]

In another decision dealing with negligence per se, *Bullock v. Fairburn,*[37] the court entertained an appeal in a damage suit based on injuries sustained when a trailer being towed by appellee became uncoupled and collided with appellant's truck.[38] Appellants alleged that the

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supreme court reversed because of a jury instruction which directed the jury to find for appellee if it found that the train was exceeding thirty miles per hour and that speed was a proximate cause of the accident. *Id.* at 469-70.

[30] Miss. Code Ann. § 77-9-237 (1972).

[31] The statute provides in part, "Any railroad company having the right of way may run locomotives and cars by steam through cities and towns, at the rate of thirty miles an hour and no more . . . ." *Id.*

[32] 344 So. 2d at 471.

[33] *Id.*

[34] *Id.*

[35] The court has found that the purpose of the statute was to prevent injuries to persons which a greater speed might cause, and to enable the train's crew to stop the train within a short distance so as to prevent injuries or death to persons who might be within reach of a train operated within municipalities. Gulf & S.I.R.R. v. Bond, 181 Miss. 254, 274, 179 So. 355, 361 (1938). Surely this purpose is desirable regardless of what agency powers the locomotive. *See* Illinois Cent. R.R. v. Pilgrim, 220 So. 2d 598, 600 (Miss. 1969) (statute evidences legislature's judgment as to safe running speed for locomotives through cities and towns).

[36] The revised statute would then read: Any railroad company having the right of way may run locomotives and cars through cities and towns, at the rate of thirty miles an hour and no more. The company shall be liable for any damages or injury which may be sustained by any one from such locomotive or cars whilst they are running at a greater speed than thirty miles an hour through any city or town. The public service commission shall have power to fix and prescribe limits in cities and towns in which railroad companies may run locomotives and cars at a greater rate than thirty miles an hour, and whenever it shall have fixed and prescribed such limits in any city or town this section shall not thereafter apply to the running of cars and locomotives within the same.

[37] 353 So. 2d 759 (Miss. 1977).

[38] Appellants, husband and wife, were severely and permanently disabled, and incurred medical expenses in excess of $14,000. *Id.* at 761.

trailer was being towed in violation of section 63-5-25 of the Mississippi Code,[39] which requires trailers towed on public highways in excess of twenty miles per hour to be equipped with a safety chain or equivalent device.[40] Appellee maintained that he was traveling at a speed of fifteen to twenty miles per hour at the time of the accident, although he admitted having earlier exceeded that speed.[41] At trial, the judge ruled that there was no violation of the statute unless the jury found that appellee was exceeding twenty miles per hour at the time of the collision. The jury returned a verdict for appellee,[42] which the supreme court reversed and remanded on the issue of damages alone.[43] The court reasoned that when a trailer lacking the required safety devices is towed in excess of twenty miles per hour, section 63-5-25 is violated, even though the towing vehicle and trailer are temporarily slowed to less than twenty miles per hour at the time the trailer becomes uncoupled.[44]

There can be little doubt that the court reached an equitable result in *Bullock.* Appellants were injured through no fault of their own,[45] and appellee had admittedly violated the statute immediately prior to the accident.[46] Still, the literal soundness of the decision is doubtful as regards the court's construction of the statute involved. In order to violate the statute in question, the defendant must be towing a trailer not equipped with safety chains or equivalent devices, and must exceed twenty miles per hour.[47]

Liability under the theory of negligence per se is dependent upon the violation of a statute,[48] which must proximately cause the resultant injury.[49] In determining that the appellee violated the statute,[50] the court reasoned that the violation constituted negligence as a matter of law,[51] and that the negligence was operative at the time of the accident.[52] Because of the absence of superseding contributory negligence on the part of appellants, and because the accident would not have happened had the trailer been secured by safety chains, the proximate cause of the appellant's injuries was, according to the *Bullock* court, the appellee's negligence.[53]

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[39] MISS. CODE ANN. § 63-5-25 (1972). The statute provides in part, "Every trailer . . . which shall be towed on the public highways at a speed in excess of twenty miles per hour shall be coupled to the towing vehicle by means of a safety chain, chains, cables, or equivalent devices in addition to the regular trailer hitch or coupling."

[40] 353 So. 2d at 761.

[41] *Id.* Appellee admitted to traveling at a speed of 20 to 25 miles per hour prior to the accident, but testified that he had slowed to between 15 and 20 miles per hour in order to cross some railroad tracks at the time the trailer became uncoupled. *Id.*

[42] *Id.*

[43] *Id.* at 763.

[44] *Id.*

[45] Appellee alleged that appellants were negligent in that they were proceeding at 50 to 60 miles per hour. *Id.* at 761-62. The court found, however, that even if appellants were negligent, their negligence could not have been the sole proximate cause of the accident. *Id.* at 762. It was undisputed that appellants were at all times on their proper side of the road. *Id.* at 760.

[46] See note 41 and accompanying text *supra.*

[47] See note 39 *supra.*

[48] See note 26 and accompanying text *supra.*

[49] Otto v. Specialities, Inc., 386 F. Supp. 1240, 1244 (N.D. Miss. 1974); Marx v. Berry, 176 Miss. 1, 8, 168 So. 61, 63 (1936); Somerville v. Keeler, 165 Miss. 244, 255-56, 145 So.

It is true, as stated by the court, that the accident would not have occurred had the trailer been secured by safety chains.[54] The defect in the court's reasoning, however, is its disregard of the express statutory requirement that the defendant must also have exceeded twenty miles per hour.[55] Testimony given by the appellee revealed that at the time of the accident, he was proceeding at less than twenty miles per hour—a fact apparently accepted as true.[56] Thus, it is difficult to reconcile the literal wording of the statute and the court's holding. This becomes particularly problematic in view of the court's holding that the appellee's violation of the statute proximately caused appellant's injuries.[57] Although the issue of whether a statutory violation proximately caused the injury complained of is normally for the jury,[58] the court's order remanding *Bullock* solely for determination of damages effectively precludes jury determination of this issue.

Taken to its logical extremes, the court's reasoning in *Bullock* could produce unfavorable results in any number of cases involving violations of highway safety statutes. For instance, if the driver of an automobile exceeded the speed limit on a trip, but temporarily slowed his vehicle to within the speed limit at which time he was involved in an accident, he could, under the *Bullock* logic, be held liable under the theory of negligence per se even though his speed in no way contributed to the accident. Admittedly, this is an extreme example, but it serves to illustrate the possible ramifications of an expansive interpretation of the *Bullock* decision. In order to avoid such results, it is suggested that the court in the future narrowly interpret *Bullock* as applying only to the

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721, 724 (1933); *see* Comment, *supra* note 26, at 256 (complete case under negligence per se equals violation of a statute plus a finding of proximate cause).

[50] 353 So. 2d at 762.

[51] *Id.*

[52] *Id.* at 763.

[53] *Id.* at 762-63.

[54] *Id.* at 763.

[55] See note 39 *supra.*

[56] See notes 41 & 42 and accompanying text *supra.*

[57] See note 53 and accompanying text *supra.*

[58] Hardy v. Lambert, 252 F.2d 709, 711-12 (5th Cir. 1958); Marx v. Berry, 176 Miss. 1, 8, 168 So. 61, 63 (1936); Somerville v. Keeler, 165 Miss. 244, 255-56, 145 So. 721, 724 (1933).

statute in question, or better yet, return to the historical precedent of allowing the jury to decide the issue of proximate cause.[59]

II. NEGLIGENCE-INVITEES

The supreme court's decision in *Mercy Regional Medical Center v. Doiron*[60] was probably the most controversial torts decision rendered in 1977. Appellee, a student nurse, sought damages for injuries sustained when she fell upon a stairway[61] located[62] on appellant-hospital's property. She charged that the failure of the hospital to provide handrails on the stairway constituted negligence.[63] The jury returned a verdict for the appellee after the trial court refused the hospital's motion for peremptory instruction.[64] On appeal, the supreme court reversed, holding that the appellant had not breached its duty to maintain reasonably safe premises.[65]

The precise issue of *Doiron* was one of first impression in Mississippi[66]—whether the failure of a business owner to provide handrails on a lengthy, narrow stairway constitutes a breach of his duty to maintain reasonably safe premises for the use of invitees.[67] The court's decision answers this question negatively, and announces, as a matter of law,[68] that the failure to provide handrails on exterior[69] stairways does not constitute negligence.

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[59] See note 57 and accompanying text *supra.*

[60] 348 So. 2d 243 (Miss. 1977).

[61] *Id.* at 243. The stairway consisted of thirty 4' wide concrete steps with 5½" risers and 12" treads. *Id.*

[62] The stairway was located across the street from the hospital and led to a parking lot owned by the hospital. Appellee, as a nursing student, was required to park in this lower lot. *Id.*

[63] *Id.* Appellee's fall occurred approximately halfway down the stairs. She lost her balance for no apparent reason, unsuccessfully reached for something to enable her to regain her balance, and fell to the ground at the side of the stairway. There was no debris on the stairway, the steps were not wet or slippery, and the condition of the steps in no way caused her to lose her balance. *Id.*

[64] *Id.* at 244.

[65] *Id.* at 246.

[66] Although the *Doiron* court relied heavily upon Supreme Instruments Corp. v. Lehr, 190 Miss. 623, 1 So. 2d 242 (1941), *Supreme Instruments* is so factually remote as to be of slight precedential value. In *Supreme Instruments,* the court ruled that the failure to provide a handrail was not negligence, and did not proximately cause plaintiff's injury. That case, however, involved but a single step, and negligence was alleged primarily because of the construction of the tread rather than the absence of a handrail. *Id.* at 626, 1 So. 2d at 245.

[67] The business proprietor in Mississippi owes to his invitees a well-defined duty to use ordinary care to maintain his premises in a reasonably safe condition. J.C. Penney Co. v. Sumrall, 318 So. 2d 829, 832 (Miss. 1975); *accord,* Stanley v. Morgan & Lindsey Inc., 203 So. 2d 473, 475 (Miss. 1967); Gulfport Winn-Dixie, Inc. v. Taylor, 246 Miss. 332, 339, 149 So. 2d 485, 488 (1963).

[68] 348 So. 2d at 244. Although the issue of negligence is normally for the jury, the court

The court's rather startling treatment of the negligence issue in *Doiron* may be better understood after an examination of the traditional modes of determining the issue of negligence vel non. The basic proposition, supported by statute[70] as well as case law,[71] is that issues of negligence and contributory negligence are for jury determination.[72] However, there exists some precedent for the proposition that when the facts are undisputed, so that no inference except negligence or the absence of negligence may be drawn, the issue is for court determination.[73] Yet another line of cases holds that where the facts are conceded, but reasonable minds might draw differing inferences concerning negligence, the issue should be submitted to the jury.[74]

The *Doiron* court, holding that appellee's injury fell within "that class of ordinary accidents which are properly imputed to the carelessness or misfortune of the one injured,"[75] concluded that the issue of negligence was for court determination since reasonable minds could not differ on the issue of negligence vel non.[76] The court reached this conclusion despite the fact that twelve presumably reasonable men of the circuit court jury did draw the factual inference that the absence of handrails constituted negligence. The ambiguity of the decision is made

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resolved the issue since the facts were undisputed. *Id.* See notes 70 through 74 and accompanying text *infra.*

[69] Presumably, the failure to provide handrails on interior stairways would constitute negligence as a matter of law since Miss. Code Ann. § 45-11-27 (1972) provides, "Every public hall, opera house, hotel, lodging house, or other public building of two or more stories, shall have provided to each stairway used by and for the public, a hand or side rail to protect persons in ascending or descending such stairway."

Appellee persuasively argued that section 45-11-27 represented the judgment of the legislature as to whether a stairway without handrails is reasonably safe, and that logically it makes no difference as to whether there is a roof over the stairway or not. Brief of Appellee in Support of Her Petition For Rehearing at 8, Mercy Regional Medical Center v. Doiron, 348 So. 2d 243 (Miss. 1977).

[70] Miss. Code Ann. § 11-7-17 (1972) provides: "All questions of negligence and contributory negligence shall be for the jury to determine."

[71] *E.g.,* Smith v. Walton, 271 So. 2d 409, 413 (Miss. 1973); Philco Distrib., Inc. v. Herron, 195 So. 2d 473, 477 (Miss. 1967); DeLaughter v. Womack, 250 Miss. 190, 205, 164 So. 2d 762, 768 (1964).

[72] See authorities cited in notes 70 & 71 *supra.*

[73] *E.g.,* Arnold v. Reece, 229 Miss. 862, 867, 92 So. 2d 237, 238 (1957); Supreme Instruments Corp. v. Lehr, 190 Miss. 623, 625, 1 So. 2d 242, 244 (1941); City of Greenville v. Laury, 172 Miss. 118, 122, 159 So. 121, 122 (1935).

[74] *E.g.,* Gow Co. v. Hunter, 175 Miss. 896, 907, 168 So. 264, 266-67 (1936); Collins Baking Co. v. Wicker, 166 Miss. 264, 268, 142 So. 8, 10 (1932); Southern Ry. v. Floyd, 99 Miss. 519, 532, 55 So. 287, 288 (1911).

[75] 348 So. 2d at 246.

[76] *Id.* at 244-46.

more obvious by the court's recognition that most people use stairs almost daily and are aware of the necessity of maintaining their balance while doing so.[77] Furthermore, the fact that handrails alleviate much of this risk has been recognized by statute and by regulations of various governmental agencies.[78] It is therefore submitted that the risk of injury in *Doiron* was easily foreseeable, and so substantial that had the hospital exercised reasonable prudence, the risk would have been anticipated. The hospital could have corrected the problem by the simple expedient of erecting handrails.[79] It would at least seem that the length and width of the stairway[80] and its location,[81] together with governmental recognition of the need for handrails,[82] would have led the court to a different result. *Doiron* would appear to fall within the class of cases where the facts are undisputed, but where reasonable minds may draw differing inferences concerning negligence; thus, determination of the issue of negligence should have been left to the jury.[83]

III. GOVERNMENTAL IMMUNITY

Despite modern critical commentary,[84] the doctrine of governmental immunity remains fundamental to tort liability in Mississippi jurisprudence.[85] This immunity denies liability for a harm-producing act of a defendant who, because of a particular status, is accorded a favored legal position by the law.[86] Under the doctrine, governmental entities remain protected from tort liability in Mississippi.[87]

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[77] *Id.* at 246.

[78] *See, e.g.*, MISS. CODE ANN. § 45-11-27 (1972) (requiring public buildings of two or more stories to provide handrails in order to protect the public); DEPT. OF THE ARMY—-CORPS OF ENGINEERS, GENERAL SAFETY REQUIREMENTS MANUAL 30.C.01 (1977) (every flight of stairs with four or more risers must be equipped with handrails); III U.S. DEPT. OF LABOR, CONSTRUCTION STANDARDS AND INTERPRETATIONS 127 (Change 2 1974) (handrails required for stairways with four or more risers).

[79] A defendant is held liable for the foreseeable consequences of his negligent act or failure to act. Cadillac Corp. v. Moore, 320 So. 2d 361, 365 (Miss. 1975); *accord,* Mauney v. Gulf Ref. Co., 193 Miss. 421, 427-28, 9 So. 2d 780, 780-81 (1942); D'Antoni v. Albritton, 156 Miss. 758, 766, 126 So. 836, 838 (1930).

[80] See note 61 *supra.*

[81] Since the stairway was located at a public hospital, it was likely to be used by the aged and infirm, as well as by more able members of society. See note 62 *supra.*

[82] See note 78 and accompanying text *supra.*

[83] See notes 70 through 74 and accompanying text *supra.*

[84] *See, e.g.*, C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 150 (1972); W. PROSSER, *supra* note 8, at 971; Borchard, *Governmental Liability in Tort,* 34 YALE L.J. 1, 2-6 (1924); Comment, *A Case for Abrogation of Municipal Tort Immunity In Mississippi,* 41 MISS. L.J. 289 (1970); 41 MISS. L.J. 471, 477-81 (1970).

[85] *See generally* Note, *supra* note 84, at 477-81.

[86] RESTATEMENT (SECOND) OF TORTS § 45A, Scope Note at 1 (Tent. Draft No. 19, 1973). As used in this Comment, governmental immunity refers to the immunity of the state, its agencies, and its subdivisions. For a discussion of the differing treatment of municipali-

Last year, the Mississippi judiciary reexamined and upheld the validity of the doctrine of governmental immunity in *Berry v. Hinds County.*[88] Appellants brought an action seeking damages for injuries sustained when their automobile crashed into a collapsed county bridge.[89] The trial court sustained appellee's general demurrer and dismissed the declaration.[90] On appeal, appellants argued that their suit was authorized by section 11-45-17 of the Mississippi Code[91] and that the doctrine of governmental immunity should be abolished.[92] The supreme court, relying upon a 1933 decision,[93] ruled that section 11-45-17, as a general statutory grant of authority to sue a governmental entity, does not create any liability, and that suit thereunder may be maintained only for liability that is authorized by statute.[94] The court, being of the opinion that "the Legislature is in a better position to limit and restrict claims that can be asserted and to provide the ways and means for paying such claims,"[95] declined to abolish the doctrine of governmental immunity.[96]

Although increasingly strong attacks on governmental immunity have led to legislative[97] or judicial[98] abrogation of the doctrine in a ma-

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ties with regard to governmental immunity, see Comment, *supra* note 84.

[87] *See generally* City of Pass Christian v. Fernandez, 100 Miss. 76, 82, 56 So. 329, 329 (1911).

[88] 344 So. 2d 146 (Miss.), *cert. denied,* 98 S. Ct. 114 (1977).

[89] *Id.* at 147.

[90] *Id.*

[91] MISS. CODE ANN. § 11-45-17 (1972) provides:

> Any county may sue and be sued by its name, and suits against the county shall be instituted in any court having jurisdiction of the amount sitting at the county site; but suit shall not be brought by the county without the authority of the board of supervisors, except as otherwise provided by law.

[92] 344 So. 2d at 147.

[93] State Highway Comm'n v. Gully, 167 Miss. 631, 145 So. 351 (1933).

[94] 344 So. 2d at 150-51.

[95] *Id.* at 151.

[96] *Id.*

[97] State legislative enactments abrogating the doctrine include: CAL. GOV'T CODE §§ 810-996.6 (West 1966); HAW. REV. STAT. §§ 662-1 to -15 (1976); N.Y. [CT. CL. ACT] § 8 (McKinney 1963); OR. REV. STAT. §§ 30.260-.300 (1977); UTAH CODE ANN. §§ 63-30-4, -10 (1977).

For a discussion of the different state legislative solutions to waiver of soverign immunity, see Comment, *An Insurance Program to Effectuate Waiver of Sovereign Tort Immunity,* 26 U. FLA. L. REV. 89, 99-103 (1973).

[98] The highest courts of 21 states and the District of Columbia have abrogated, in varying degrees, the doctrine of governmental immunity in tort actions. *See* Spencer v. General Hosp., 425 F.2d 479, 483-84 (D.C. Cir. 1969) (governmental immunity abolished in the District of Columbia); Scheele v. City of Anchorage, 385 P.2d 582, 583 (Alaska 1963) (municipalities liable for torts); Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d

jority[99] of states, Mississippi has steadfastly adhered to the doctrine.[100] As the *Berry* court noted, the legislature has "chipped away" at the doctrine,[101] but the resulting conglomeration of laws has created confu-

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107, 109 (1963) (governmental immunity for tort liability abolished); Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45, 51 (1968) (municipalities liable for tortious acts of their servants acting in a governmental capacity); Muskoph v. Corning Hosp. Dist., 35 Cal. 2d 211, 359 P.2d 457, 462, 11 Cal. Rptr. 89, 94 (1961) (defense of governmental immunity abolished for ministerial activity); Evans v. Board of County Comm'rs, 174 Colo. 97, 482 P.2d 968, 968 (1971) (governmental immunity abolished); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133-34 (Fla. 1957) (municipalities liable for torts of employees acting within scope of employment); Smith v. State, 93 Idaho 795, 473 P.2d 937, 944 (1970) (governmental immunity abolished for proprietary functions); Molitor v. Kaneland Community Unit Dist., 118 Ill. 2d 11, 163 N.E.2d 89, 98 (1959), *cert. denied*, 362 U.S. 968 (1960) (school districts liable for their torts); Campbell v. State, 259 Ind. 55, 284 N.E.2d 733, 737 (1972) (defense of governmental immunity abolished); Carroll v. Kittle, 203 Kan. 841, 457 P.2d 21, 27 (1969) (state immunity in proprietary activities abolished); Haney v. City of Lexington, 386 S.W.2d 738, 742 (Ky. 1964) (municipal corporations liable for their torts); Hamilton v. City of Shreveport, 247 La. 784, 174 So. 2d 529, 532 (1965) (legislative grant of authority to be sued constitutes waiver of governmental immunity); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1, 2 (1961) (municipalities liable for torts); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795, 803 (1962) (prospectively abolished governmental immunity for subdivisions of the state); Johnson v. Municipal Univ., 184 Neb. 512, 169 N.W.2d 286, 289 (1969) (governmental immunity should be considered on a case-by-case basis); Brown v. City of Omaha, 183 Neb. 430, 160 N.W.2d 805, 808-09 (1968) (subdivisions of state liable for tortious operation of motor vehicles); Willis v. Department of Conservation, 55 N.J. 534, 264 A.2d 34, 36 (1970) (state liable for its torts); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605, 608 (1963) (counties liable for negligent road maintenance); Ayala v. Philadelphia Bd. of Pub. Educ., 453 Pa. 584, 305 A.2d 877, 878 (1973) (political subdivisions liable for their torts); Becker v. Beaudoin, 106 R.I. 562, 261 A.2d 896, 901-02 (1970) (prospectively abolished governmental immunity of municipal corporations and quasi-municipal corporations); Ward v. County Court, 141 W. Va. 730, 93 S.E.2d 44, 49 (1956) (state immunity abolished for proprietary activities of public corporations); Holytz v. City of Milwaukee, 17 Wis. 2d 26, 115 N.W.2d 618, 623-24 (1962) (governmental immunity for torts abolished).

[99] A total of 27 states have either judicially or statutorily abrogated the doctrine. 344 So. 2d at 147.

[100] *See, e.g.*, Owens v. Jackson Mun. Separate School Dist., 264 So. 2d 892, 892 (Miss. 1972) (state and its subdivisions immune from suit except in proprietary matters where immunity has been abrogated by statute); Lowndes County, Dist. 5 v. Mississippi State Highway Comm'n, 220 So. 2d 349, 351 (Miss. 1969) (state agencies are not subject to suit in the absence of statutory authority); Board of Supervisors v. Payne, 175 Miss. 12, 23, 166 So. 332, 335 (1936) (counties not liable for neglect of duty); Brabham v. Board of Supervisors, 54 Miss. 363, 364 (1877) (county not liable for damages caused by its neglect in repairing a county bridge).

[101] 344 So. 2d at 148; *see* MISS. CODE ANN. § 19-7-8 (Supp. 1977) (counties may purchase liability insurance for motor vehicles and may be sued to the extent of insurance carried); *id.* § 37-41-37 (county or school district operating school buses liable for damages caused by negligent operation or maintenance of buses); *id.* §§ 19-13-51, -55 (1972) (board of supervisors can in its discretion allow damages for injury to property and stock caused by defects in county bridges, causeways, or culverts).

sion and caused inequities[102] in many instances. Moreover, plaintiffs who are injured by the state's harm-producing acts remain without remedy unless their injury falls within a narrow class[103] of injuries for which the legislature has provided liability.

Retention of governmental immunity in its present form has little practical justification either for the state or its subdivisions. Proponents of the doctrine usually offer the justification that the doctrine embodies the idea that the state can do no wrongful act.[104] There also exists the very dubious theory that a government agent is outside the scope of his authority anytime he commits a wrongful act,[105] and the notion that public administration would be hindered if the government were forced to defend its harm-producing acts against every aggrieved citizen.[106] Probably the greatest single drawback to abolition of the doctrine, however, is the state's reluctance to allow use of public funds to compensate citizens for private injuries,[107] and the related argument that such compensation would financially cripple the state.[108] While valid on its face, this argument loses much appeal when one considers the state's superior ability to absorb any loss caused by its agents, since most of its functions are insurable.[109] Moreover, suits against governmental entities in jurisdictions that have abrogated the doctrine have not created an unbearable strain on state finances.[110]

Restriction of the application of governmental immunity in Mississippi is imperative. The social harm of uncompensated losses far outweighs the costs that would be incurred should the state assume liability for its harm-producing acts. Ideally, this action should be in the form of a comprehensive legislative enactment. The legislature is in a position to benefit from the experience of the federal government[111] and other states that have enacted tort claims acts,[112] and to provide the ways and means for the payment of claims. If the legislature fails to act, however, the court should exercise its judicial power[113] to abrogate the antiquated, unfair, and illogical doctrine.

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[102] For example, Miss. Code Ann. § 19-7-8 (Supp. 1977) authorizes but does not require counties to purchase liability insurance on its motor vehicles. A county that purchases the insurance waives its immunity to the extent of its insurance coverage. However, counties that decide not to purchase insurance apparently retain complete immunity from suit. Therefore, whether a plaintiff who is injured by a county's negligent operation of a motor vehicle is able to recover is made dependent upon whether the county has exercised its option to purchase liability insurance.

[103] See note 101 and accompanying text *supra.*

[104] *See* W. Prosser, *supra* note 8, at 975 (this idea derives from the English common law theory that "the King can do no wrong").

[105] *Id.*

[106] *Id.*

[107] *Id.*; *see* Comment, *To Catch the Elusive Conscience of the King: The Status of the Doctrine of Sovereign Immunity in Alabama,* 26 Ala. L. Rev. 463, 483 (1974) (protection of state funds is most consistently offered justification for sovereign immunity).

[108] See authorities cited in note 107 *supra.*

[109] Comment, *supra* note 107, at 483. *See generally* Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government,* 1959 Duke L.J. 588.

[110] For example, California has maintained an effective insurance program for approximately $1,198,000 yearly. Comment, *supra* note 97, at 90. Hawaii's waiver of tort immunity resulted in liability of only $120,453 in 1972. *Id.* at 91. *See generally* Comment, *Governmental Tort Immunity in Massachusetts: The Present Need For Change and Prospects for the Future,* 10 Suffolk U.L. Rev. 521, 533-34 (1976).

IV. CONCLUSION

The decisions of the 1977 Mississippi Supreme Court in the area of tort law are marked by caution and what seems to be a judicial inclination towards the limitation of liability. The decision in *Barnes,* narrowing the standards governing application of the doctrine of res ipsa loquitur,[114] is indicative of this attitude. The most disturbingly controversial decisions are those which deal with negligence vel non[115] and the doctrine of governmental immunity.[116] In both instances, the court limited the liability of entities which may better absorb the loss incurred by another due to the negligent acts of their agents. This effectively constructs a judicial barrier which may prove inhibitive of legitimate claims. It is hoped that in the rendition of such decisions, the Mississippi court does not ignore the advice of Justice Griffith to "give to the law a practical measure of certainty and make it the law of the land rather than the pronouncement of the particular judges who, in a particular case and for the time being, may happen to have the power to decide."[117]

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[111] *See* Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1976) (creating tort liability for the federal government). The act provides for liability for the United States for money damages for injury or loss of property caused by the negligent or wrongful act or omission of an agent of the government while acting within the scope of his employment, under circumstances where the United States, if acting as a private person, would be liable under the law of the place where the act occurred. 28 U.S.C. § 1346(b)(1976). For excellent discussions of the perimeters of the Federal Tort Claims Act, see Buford, *The Federal Torts Claims Act,* 20 MISS. L.J. 354, 354-72 (1949); Keady, *Federal Tort Claims Act,* 32 MISS. L.J. 276, 276-82 (1961).

[112] See note 97 and accompanying text *supra.*

[113] The court states that it, as well as the legislature, has the undoubted right to abrogate the doctrine of governmental immunity. Berry v. Hinds County, 344 So. 2d at 151.

[114] See note 21 and accompanying text *supra.*

[115] See notes 60 through 65 and accompanying text *supra.*

[116] See notes 88 through 95 and accompanying text *supra.*

[117] Wheat v. State, 201 Miss. 890, 903, 30 So. 2d 84, 88 (1947) (Griffith, J., concurring).

MISCELLANEOUS

Last year, the Mississippi Supreme Court rendered decisions involving a variety of topics that are not treated in other sections of this review. Arranged alphabetically in this commentary, these topics include civil procedure, jurisdictional matters, contracts, taxation, and constitutional law, as well as more specific topics such as juveniles, hospitals, and local government. While some cases in these areas had little impact upon preexisting decisions and are rather briefly discussed, several decisions demand more extensive analysis and commentary. It is hoped that the following suggestions will benefit the practitioner and student alike.

I. Appeal and Error

Having relatively minor precedential significance, the six opinions dealing with appeal and error[1] rendered by the supreme court in 1977 were important in at least one respect—they clarify the existing law and will certainly aid attorneys in properly conforming to the strictures of Mississippi appellate procedures. Nonetheless, the decisions merit no written commentary.

II. Civil Procedure

Among the civil procedure cases decided by the court last year,[2] only one, *Magee v. Griffin,*[3] warrants discussion. *Magee* includes an excellent discussion of claim and delivery actions, res judicata, and collateral estoppel. In *Magee,* an automobile owner deliberately refused to answer a claim and delivery action brought by a lienholder, thereby allowing a default judgment to be taken against him. No appeal was taken and the automobile was repossessed.[4] The owner later filed suit against the lienholder and the lienholder's agent, alleging that he had made cash payments directly to the lienholder's agent pursuant to instructions from the agent.[5] Res judicata barred the owner from relitigating the issue of the lienholder's right to take the automobile following default.[6] The *Magee* court announced, however, that any action against the agent to recover for illness, humiliation, mental anguish, and loss of the automobile was not barred by res judicata or collateral estoppel.[7]

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[1] Nelson v. Home Ins. Co., 353 So. 2d 763, 765-66 (Miss. 1977) (trial court, in suit to recover the value of guns, erred in denying appellant's motion to reopen for the limited purpose of establishing the value of the guns as of the date of their theft); State v. Richardson, 350 So. 2d 59, 59-60 (Miss. 1977) (pursuant to state statute, on the granting of a new trial, the sole issue the appealing party can raise is whether the trial court abused its discretion on the question of damages); Kennedy v. Gervais, 345 So. 2d 1039, 1039 (Miss. 1977) (en banc) (appeal dismissed for want of jurisdiction because of failure to post timely appeal bond as required by statute); Cotton v. Veterans Cab Co., 344 So. 2d 730, 731 (Miss. 1977) (appeals to state supreme court from circuit court permissible only when there is final judgment as to all issues and parties); Hamilton v. Poteet, 343 So. 2d 1222, 1223-26 (Miss. 1977) (en banc) (treatment of motions regarding deficient abstracts; court also set forth requirements and proper form for an abstract); Fairley v. State, 343 So. 2d 483, 483 (Miss. 1977) (en banc) (state's motion to strike the transcript on ground that notice to transcribe was not given within the time limit overruled under SUPREME COURT RULE 33). *See generally* Allen & Taylor, *Appeals to the Mississippi Supreme Court,* 48 MISS. L.J. 505 (1977).

[2] The other two cases are Deaton, Inc. v. Blackeney, 349 So. 2d 542, 544-45 (Miss. 1977) (defendant's failure to deny allegation of existence of partnership gave rise to existence of partnership as a matter of law); McGee v. Clark, 346 So. 2d 914, 916 (Miss. 1977) (appellees entitled to damages pursuant to state statute where appellant's appeal from an order of specific performance of an option contract was affirmed).

[3] 345 So. 2d 1027 (Miss. 1977).

It would seem that the court properly disallowed the claim of an owner who chose to ignore his financial obligations until a valid default judgment was taken against him. In so doing, however, the court provided an equitable balance by allowing claims that arose from the wrongful acts of the lienor's agent. In essence, the *Magee* court took a practical step toward the protection of the rights of all parties to such a transaction.

III. CONSTITUTIONAL LAW

The Mississippi Supreme Court decided seven cases last year concerning constitutional law, five of which were relatively insignificant.[8] The remaining two cases dealt with important issues concerning state taxation of a foreign corporation and illegitimates' right of support.

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[4] *Id.* at 1029.

[5] *Id.*

[6] *Id.* at 1030.

[7] *Id.* at 1030, 1033.

[8] NCAA v. Gillard, 352 So. 2d 1072, 1081-82 (Miss. 1977) (football player's right to engage in intercollegiate football is not a recognizable property interest subject to due process protection); Mississippi State Tax Comm'n v. Reynolds, 351 So. 2d 326, 328 (Miss. 1977) (Alcoholic Beverage Control Division could not deny application for permission to be a cocktail waitress solely on basis of age where applicant's disability of minority had been removed by court); Rolph v. Board of Trustees, 346 So. 2d 377, 379 (Miss. 1977) (where a statute provides that other county hospitals are liable to the extent of their liability insurance, another statute allowing only defendant-county hospital to waive its immunity from suit in those cases which it determines to have merit and to be in best interest of hospital, has no rational justification and therefore is an unconstitutional "county wide" law); Harris v. Harris, 343 So. 2d 762, 764 (Miss. 1977) (parent with primary custody of minor child may take child to religious services where poisonous snakes are caged so long as child is not exposed to physical danger); City of Water Valley v. Trusty, 343 So. 2d 471, 472 (Miss. 1977) (city dog-leash ordinance providing for impoundment and subsequent destruction of dogs running at large held constitutional).

A. Taxation of Foreign Corporations

The Mississippi Supreme Court last year confronted the issue of state taxation of foreign corporations in *Brady v. John Hancock Mutual Life Insurance Co.*[9] Appellee Hancock, a foreign corporation,[10] was contesting a State Tax Commission assessment upon interest income from loans made by Hancock to Mississippi residents. These loans were secured by real property located in Mississippi.[11] Deeds of trust securing the mortgage loans were recorded in Mississippi, but were later transferred to Hancock's home office in Massachusetts at the closing of the loan.[12] Hancock argued that the nexus between the deed of trust, recorded in Mississippi, and the note, kept in Massachusetts, was insufficient to justify taxation of the income from the note pursuant to section 27-7-23 of the Mississippi Code.[13]

Prior to amendments in 1952 and 1958, the predecessor of section 27-7-23[14] provided that "income from money loaned by . . . foreign corporations . . . shall not be included as taxable income."[15] In accordance with the statute, the regulations of the State Tax Commission specially exempted the interest on residents' notes from the gross income of foreign corporations.[16]

The resulting disparity in treatment of foreign and resident corporations for tax purposes[17] was addressed by the court in *Mississippi Cottonseed Products Co. v. Stone.*[18] In *Stone,* the Mississippi Supreme Court held that, in order to implement the legislature's intention of treating foreign and domestic corporations equally,[19] the word "to" should be substituted for "by" so that the statute would read "[I]ncome from any loan to foreign corporations . . . shall not be included as taxable income"[20] to a foreign corporation. Following *Stone,* the State Tax Commission changed the regulation that exempted interest on notes held outside the state from the taxable income of foreign corporations.[21] Instead, the Commission adopted new criteria for taxation, providing that interest income earned from such notes would be taxable only if the income was "derived from business done or from property located within the state."[22] This "business situs" exception proved to be mostly theoretical,[23] since the source of income from[24] and the situs of intangible property were generally held to be the domicile of the owner.[25]

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[9] 342 So. 2d 295 (Miss.), *appeal dismissed,* 98 S. Ct. 32 (1977).

[10] 342 So. 2d at 296-97.

[11] *Id.* at 297.

[12] *Id.*

[13] *Id.* at 298.

[14] 1924 Miss. Laws, ch. 132, § 15(1)(a). This statute was rewritten in 1934 and 1936, but no material change in the provisions in question was made. 342 So. 2d at 299.

[15] 1924 Miss. Laws, ch. 132, § 15(1)(a).

[16] 342 So. 2d at 299.

[17] *Id.*

[18] 184 Miss. 409, 184 So. 428 (1938), *cert. denied,* 306 U.S. 656 (1939).

[19] 184 Miss. at 421, 184 So. at 431.

[20] *Id.*

[21] 342 So. 2d at 299.

The statute was amended in 1952[26] to include the interest on notes secured by land within the state "if the evidence of ownership [of the note] has acquired a business situs in this state."[27] However, the tax commission's interpretation of the statute remained unchanged.[28] The business situs was still thought to be the state where the intangible was held; therefore, no assessment of tax on the interest income could be made by the tax commission.[29] As the statute presently reads,[30] income from intangibles held outside the state is taxable "if the evidence of ownership has acquired a business, commercial or actual situs in this state."[31] Despite the addition of "commercial or actual" to "business" situs, the tax commission retained its earlier view, maintaining that the income from intangibles held outside Mississippi, though secured here, was not taxable since the intangible had no business situs within the state.[32]

The tax commission's interpretation of section 27-7-23, failing to take the 1952 and 1958 amendments into account, had been unchanged since 1939.[33] Hancock therefore argued that the commission's interpretation of the statute, though possibly erroneous, carried the force of law.[34]

The Mississippi Supreme Court disagreed with Hancock's arguments. After an exhaustive examination of the legislative history of section 27-7-23,[35] the court concluded that the purpose of the 1952 and

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[22] *Id.* This regulation was continued in Miss. State Tax Comm'n Reg. 9, art. 245 (1948).

[23] 342 So. 2d at 300.

[24] *Id.*

[25] *Id.* (citing Gully v. C.I.T. Corp., 168 Miss. 268, 150 So. 367 (1933)).

[26] MISS. CODE ANN. § 9220-12 (1942) (current amended version at MISS. CODE ANN. § 27-7-23 (Supp. 1978)).

[27] MISS. CODE ANN. § 9220-12(1)(2).

[28] 342 So. 2d at 300. The business situs test for taxation of income from intangibles held out of state required a showing that the foreign corporation have "a degree of permanence evidenced by offices, agents, bank accounts or some such symbol" within the state to justify the taxation. *Id.* at 301.

[29] 342 So. 2d at 301.

[30] The statute has not been amended in this respect since 1958.

[31] MISS. CODE ANN. § 27-7-23(c)(2)(B)(iii) (Supp. 1978).

[32] 342 So. 2d at 301-02.

[33] *Id.* at 299.

[34] *Id.* at 298.

[35] *Id.* at 298-304.

1958 amendments was to broaden the basis for permissible state taxation of income from intangibles held outside the state.[36] By adding "commercial or actual" situs to "business" situs, the legislature intended, according to the court, to expand taxation beyond situations where the difficult business situs test could be met.[37] The court further concluded that the legislature intended "evidence of ownership" to refer to the instrument used to describe the security, the deed of trust.[38] When recorded, the court reasoned, the deed of trust has an actual situs in the county of its recordation.[39] Consequently, the nexus between the intangible note and the deed of trust held by Hancock in Massachusetts was sufficient, because of the recording of the deed of trust in Mississippi, to justify state taxation of the mortgage loan interest income pursuant to section 27-7-23.[40]

In reaching its decision, the court also held that prior statutory constructions for administrative purposes do not carry the force of law since administrative bodies retain the power, under varied situations or circumstances, to change their interpretations.[41] The court noted that the judiciary and legislature also have the power to alter administrative interpretations[42] and that a judicial or legislative statutory interpretation is not subject to further administrative rule change if the statute remains substantially unchanged.[43]

The *Brady* court clearly reached the result dictated by the legislature's amendments of section 27-7-23. Considering the protection afforded both the land and the mortgagee under the law of Mississippi,[44] the connection between a deed of trust recorded in this state and a note held out of state is certainly close enough to justify taxation by Mississippi of interest income on the note. The older view that a note and the security for the note are separable for purposes of generation of income refuses, as the *Brady* court noted, to recognize the business reality "that the security breathes life into the note."[45] Although the Mississippi Supreme Court forty years ago espoused a view of equal treatment of foreign and domestic corporations,[46] the actual disparity in treatment by the tax commission has been unchecked. The *Brady* decision not only ends the tax commission's more favorable treatment of foreign corporations, but also effectuates the legislature's intent and will prove instrumental in raising needed revenue.

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[36] *Id.* at 303.

[37] *Id.* See note 28 and accompanying text *supra.*

[38] *Id.* at 304. The court concluded that the deed of trust is evidence of ownership of the intangible because the deed of trust "names the beneficiary, the mode and time of payment, the assignments, and substitution of trustees, if any, as well as the note's satisfaction when paid, all of which 'evidence' ownership." *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 304-05. The varied circumstances exception provided the court with a basis for distinguishing Barr v. Delta & Pine Land Co., 199 So. 2d 269 (Miss. 1967), where the court held that because of public reliance upon administrative interpretations of statutes, such constructions are binding upon the administrators and their successors. *Id.* at 272.

[42] The court's reasoning was that since administrative bodies may change their practices, it follows that administrative practices are also subject to legislative and judicial change. 342 So. 2d at 304-05.

[43] *Id.*

[44] The State Tax Commission had argued in vain at the trial court that the nexus between the intangible note and the deed of trust was sufficient to justify taxation since the land is protected by the laws of Mississippi and the laws of this state provide the sole means of enforcing the mortgagee's lien upon the land. *Id.* at 298.

B. *Right of Support for Illegitimates*

Last year, in *Rias v. Henderson*,[47] the supreme court decided the constitutionality of a state statute that operated to the disadvantage of illegitimate children.[48] The statute provided that fathers of illegitimates be required to pay for the support and education of their children until the age of sixteen,[49] while state law dealing with support of legitimate minors imposed no age limitations.[50] The action commenced when Rias, as guardian ad litem, appealed a Hinds County Court filiation order requiring Henderson to pay for his children's support and education only until age sixteen.[51] Rias contended that the statute was violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution. The supreme court agreed, holding that the statute did violate equal protection since it discriminated on the basis of illegitimacy and since there was "no constitutionally legitimate reason for limiting the right of support."[52]

In reaching its decision, the court noted several cases in which the United States Supreme Court has articulated the standard of review for testing the validity of state action that discriminates against illegitimates.[53] The court, relying principally on *Weber v. Aetna Casualty &*

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[45] *Id.* at 304.

[46] *See* Mississippi Cottonseed Products Co. v. Stone, 184 Miss. 404, 421, 184 So. 428, 431 (1938), *cert. denied*, 306 U.S. 656 (1939).

[47] 342 So. 2d 737 (Miss. 1977).

[48] MISS. CODE ANN. § 93-9-29(2) (1972).

[49] *Id.*

[50] *Id.* § 93-11-65.

[51] 342 So. 2d at 738.

[52] *Id.* at 739-40.

[53] The court discussed: Gomez v. Perez, 409 U.S. 535, 537-38 (1973) (Texas statute denying illegitimates right to support from father held unconstitutional); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175-76 (1972) (Louisiana statute barring unacknowledged minor illegitimates from taking deceased father's workman compensation benefits when enough minor legitimate survivors exhausted maximum benefits held unconstitutional);

Surety Co.,[54] concluded that there is "a hybrid standard of review" applicable to illegitimacy cases that results in a more critical scrutiny of the law involved than the standard of review applied to state regulation of business or social programs.[55] The court also discussed *Gomez v. Perez,*[56] a United States Supreme Court case which held that "a state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."[57] Relying on *Pass v. Pass,*[58] a 1960 Mississippi case which held that "worthy" children are entitled to a college education if the father can afford it,[59] the *Rias* court held that "[t]he right to a college education under appropri-

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Labine v. Vincent, 401 U.S. 532, 535 (1971) (Louisiana statute barring acknowledged illegitimate minor from sharing equally with legitimate minor in father's intestate estate held constitutional); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 74-76 (1968) (Louisiana statute barring mother from instituting action for wrongful death of illegitimate child held unconstitutional); Levy v. Louisiana, 391 U.S. 68, 71-72 (1968) (Louisiana statute barring illegitimates from instituting action for wrongful death of mother held unconstitutional).

[54] 406 U.S. 164 (1972).

[55] 342 So. 2d at 739. As the court noted, the standard of review for determining whether a state law violates the equal protection clause depends on what classification the law infringes on. Generally, social and economic legislation receives deferential treatment via the rational basis test. *E.g.,* McGowan v. Maryland, 366 U.S. 420 (1961). In upholding a Maryland Sunday Closing Law in *McGowan,* the Court stated, as to the standard of review for socio-economic legislation, "[A] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426. At the other extreme, state action which discriminates on the basis of race receives the strict scrutiny standard of review, which is virtually impossible to weather. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973) (state must show compelling state interest and no alternative means available to achieve desired purpose). When *Rias* was decided, one of the latest United States cases dealing with the equal protection standard of review applicable to state laws which discriminate on the basis of illegitimacy implied that the standard was somewhere in between the rational basis and strict scrutiny tests. *See* Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1972), where the Court stated:

> The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. Though the latitude given state economic and social legislation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. The essential inquiry . . . is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?

Id. at 173 (citations omitted).

[56] 409 U.S. 535 (1973).

[57] *Id.* at 538. The Court employed this rationale in invalidating a Texas law which imposed a duty on the part of the fathers of legitimate minors to support them, but did not impose the duty as to illegitimates. *Id.* at 537-38.

[58] 238 Miss. 449, 118 So. 2d 769 (1960).

[59] *Id.* at 458, 118 So. 2d at 773.

ate circumstances is a substantial benefit which is denied illegitimate children under the statute in question."[60] The court then applied the "hybrid" standard of review for state laws that discriminate against illegitimates and invalidated the statute since there was no "constitutionally legitimate" reason for limiting support to illegitimates.[61]

While the *Rias* holding comports with the United States Supreme Court decisions regarding classifications of illegitimates, *Rias* contains dictum indicating that the Mississippi Supreme Court is at odds with the United States Supreme Court concerning the validity of another Mississippi statute dealing with illegitimates. The *Rias* court, after its holding regarding the support statute, reaffirmed the validity of the Mississippi statute that prevents an illegitimate from taking the property of his father through intestate succession unless the father acknowledges the child and marries the child's mother.[62] To support this dictum, the court relied on the 1971 United States Supreme Court case of *Labine v. Vincent*.[63] In *Labine*, the Court upheld a Louisiana intestate succession statute that excluded acknowledged illegitimates from inheriting any part of their intestate father's estate if the father had any surviving relatives.[64] This statute was upheld because of "the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders."[65] After discussing *Labine*, the *Rias* court stated that the decision as to the support statute in no way affected the validity of Mississippi's intestate succession scheme that discriminates against illegitimates.[66] It is obvious that the court did not anticipate that some two months after its decision, the United States Supreme Court would, in effect, overrule *Labine* in *Trimble v. Gordon.*[67]

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[60] 342 So. 2d at 740.

[61] *Id.*

[62] MISS. CODE ANN. § 91-1-15 (1972) provides in pertinent part:

> If any man beget a child or children by a woman whom he shall afterward marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgement, be legitimate and capable in law to inherit and transmit inheritance as if born in wedlock.

[63] 401 U.S. 532 (1971).

[64] *Id.* at 535-40. The statute provides in pertinent part: "Natural children are called to the inheritance of their natural father, who has duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State." LA. CIV. CODE. art. 919 (1952).

[65] Rias v. Henderson, 342 So. 2d 737, 741 (Miss. 1977) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170 (1972), which explained the *Labine* decision).

[66] *See* 342 So. 2d at 741.

> Mississippi has a profound and constitutionally sound reason for classifying legitimates differently from illegitimates in the laws of descent and distribution of property of a person who dies intestate. Some of these reasons are mentioned in *Labine* and *Weber*. Our decision in the present case does not weaken the authority of this State to provide for exclusion of illegitimates from inheriting property from intestate natural fathers.

Id.

Trimble dealt with an Illinois intestate succession statute identical to Mississippi's.[68] The Court held five to four that the statute was violative of equal protection despite the state's assertion that the statute was necessary because of the difficulty involved in proving paternity.[69] The Court held that this difficulty does not justify "the total statutory disinheritance" of illegitimates with intestate fathers.[70] The Court also acknowledged that it had examined the Illinois statute more critically than the Lousiana statute in *Labine,* but stated, "To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls."[71]

It is obvious then, after *Trimble v. Gordon,* that Mississippi's intestate succession statute dealing with illegitimates is violative of equal protection. The statute, though phrased differently than the Illinois statute, contains the same requirements that *Trimble* holds to be constitutionally defective. As of this writing, however, the statute has not been challenged.

IV. CONTRACTS

Two of the contracts cases decided by the state supreme court last year, one dealing with punitive damages[72] and the other with the parol evidence rule,[73] had only minor significance. A third case, *Hamilton v.*

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[67] 430 U.S. 762 (1977).

[68] The statute provided in pertinent part:

> An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents inter-marry and who is acknowledged by the father as the father's child is legitimate.

ILL. REV. STAT. ch. 3, § 12 (1973).

[69] 430 U.S. at 765-66, 770-72.

[70] *Id.* at 772. The Court also rejected the state's claim that the law was necessary to promote legitimate family relationships. *Id.* at 768-70.

[71] *Id.* at 776 n.17. The Court employed the *Weber* standard of review for illegitimacy classifications, see note 55 *supra,* and concluded that the laws do not merit strict judicial scrutiny but rather a scrutiny that " 'is not a toothless one.' " 430 U.S. at 767.

[72] Lincoln Nat'l Life Ins. Co. v. Crews, 341 So. 2d 1321, 1322 (Miss. 1977) (merely rejecting the claims of insured and defending suit brought by same did not amount to the "intentional wrong, insult, abuse or gross negligence" required to impose punitive damages in a breach of contract action).

[73] Ralston Purina Co. v. Rooker, 346 So. 2d 901, 903 (Miss. 1977) (since the contract terms for the sale of soybeans were intended "as an exclusive statement of the agreement," the defense of impossibility of performance under force majeure was not available).

McGill,[74] produced important developments in the law of secured land transactions.

McGill executed a note and deed of trust for the balance of the purchase price of land sold to him by Hamilton and Farris.[75] As part of the same transaction, though by separate agreement,[76] McGill paid to retire a note of Hamilton and Farris and also executed a timber deed to them in return for their transfer of cattle and farm equipment to him.[77] Intending to use the land as a cattle farm, McGill made an inspection of the property prior to consummating the purchase, and was told by Hamilton that Harland's creek, which traversed the property, "did not flood, overflow, or have any flooding problems."[78] McGill purchased and made improvements on the land, and began operating a cattle farm on it.[79] Less than six months had elapsed[80] when a flashflood caused the creek to overflow, flooding McGill's property.[81] Three calves drowned in the floodwaters, a fence on the land was damaged, and silt deposits left by the water rendered the grass on the property temporarily unfit for bovine consumption.[82] Arguing that he had been fraudulently induced to purchase the land, McGill promptly filed a suit for recission of the deed.[83]

Stating the general rule that fraud is never presumed and must be proved by clear and convincing evidence,[84] the supreme court held that since the statements made by Hamilton to McGill were false, material to the transaction, and made in positive terms, the chancellor's finding of fraud was not manifestly wrong.[85] Testimony at the trial showed that there was "no evidence of previous flooding" upon the land itself.[86] Furthermore, McGill's repeated questions about possible flooding problems indicated his reliance, in purchasing the land, on Hamilton's assurances that there would be no such problems.[87]

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[74] 352 So. 2d 825 (Miss. 1977) (en banc).

[75] *Id.* at 826.

[76] *Id.*

[77] *See id.* at 826, 828.

[78] *Id.* at 827.

[79] *Id.* at 826. McGill had remodeled a residence on the property and had hired a manager to operate and improve the farm. *Id.*

[80] McGill purchased the land on September 27, 1974; the rains came on March 12, 1975. *Id.*

[81] In some places between hills, the bottomland was covered by five feet of water. *Id.*

[82] *Id.*

[83] *Id.* The complaint also prayed for a refund of both the down payment and money expended on improvements, a lien on the land, sale of the land to satisfy any damage award, and general relief. McGill did not offer to return the land, though he did offer to return the cattle and farm equipment. The defendants demurred and filed a crossbill against McGill for interference with the sale of timber. *Id.* at 826-27. Upholding the chancellor's overruling of the demurrer, the supreme court stated that "if the bill has some merit, and considered as a whole it shows a good cause of action, it will stand as against a general demurrer," *id.* at 829 (quoting McMahon v. McMahon, 243 Miss. 89, 99, 137 So. 2d 520, 524 (1962)), despite the fact that in his complaint McGill had not tendered a return of the land "in exact and precise terms." 352 So. 2d at 829. The court noted that the trend is away from settling "close and difficult questions of law and right on a demurrer." *Id.* (quoting GRIFFITH, MISSISSIPPI CHANCERY PRACTICE 297 (2d ed. 1950)).

[84] 352 So. 2d at 831. The court cited McMahon v. McMahon, 247 Miss. 822, 157 So. 2d 494 (1963), where the court ruled that to establish fraud the following six elements must be shown: (1) the falsity of the representation, (2) the materiality of the false representa-

The court refused, however, to grant recission of the deed, arguing that the transaction could not be rescinded upon a fair basis.[88] Recission would not have been equitable, according to the court, since McGill had made improvements on the land and had failed to keep proper records of his transactions in selling the cattle he had bought from Hamilton.[89] The proper remedy, the court reasoned, was abatement in the purchase price rather than recission.[90]

A three-judge dissent,[91] arguing that the fraud question properly concerns the value of the land,[92] disagreed that the proof of fraud was clear and convincing.[93] According to the dissent, an intelligent, experi-

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tion, (3) the speaker's intent that it be acted upon by others in the anticipated manner, (4) the hearer's ignorance of its falsity and reliance on its truth, (5) the hearer's right to rely thereon, and (6) the hearer's consequent and proximate injury. *Id.* at 836, 157 So. 2d at 501.

[85] 352 So. 2d at 831.

[86] *Id.* The court referred to debris, water marks and sand deposits as evidence of flooding. *Id.*

[87] *Id.* Hamilton suffered pecuniary damage as the direct result of the flooding. *Id.*

[88] *Id.*

[89] *Id.* Another ground for denying rescission recognized by the trial court was that the property was still suitable for cattle operations despite periodic flooding. *Id.* at 827. *But cf.* Brown v. Norman, 65 Miss. 369, 381-82, 4 So. 293, 297 (1888) (granting recission in fraud case although status quo could not literally be restored).

[90] An abatement of $53,400, plus interest of $4,395 was made on the purchase price. *Id.* at 827. Though McGill had not prayed specifically for an abatement in the purchase price the court noted that any justified relief may be granted under a prayer for general relief if such relief does not surprise or prejudice the defendant. *Id.* at 830 (quoting Milam v. Paxton, 160 Miss. 562, 570, 134 So. 171, 173 (1931)).

[91] Justices Lee, Smith, and Walker dissented. 352 So. 2d at 831.

[92] *Id.* at 832. In Deshatreaux v. Batson, 159 Miss. 236, 243, 131 So. 346, 348 (1930), the court said: "The general rule is that a person has no right to rely on representations as to value; he is required to exercise his own judgment as to value." *See also* Hunt v. Sherrill, 195 Miss. 688, 702, 15 So. 2d 426, 431 (1943) (en banc) (testimony as to value is dangerous guess work which is "limited only by the imagination of the witnesses, and, to a large extent, that of the jury").

[93] Several witnesses testified that the creek rarely overflowed, that when it did the pasture land was not damaged, and that the property was suitable to a successful cattle operation. 352 So. 2d at 832. Additionally, it was pointed out that the evidence did not indicate what the parties meant by "flood and overflow," and that these terms have different meanings from one locality to the next. *Id.* at 833. Appellants established that McGill had purchased neighboring property, also traversed by Harland's Creek, five days after the flood. *Id.* at 827.

enced businessman like McGill is under a duty to make an independent investigation of any matters that concern him before entering an agreement.[94]

The *McGill* court's leniency in finding that the elements of fraud had been proved by clear and convincing evidence will surely have significant influence in secured land transaction cases where fraud is argued. Nevertheless, the advice of the dissenters is appealing, since in business transactions between sophisticated parties the purchaser should bear the responsibility of making an independent investigation into important considerations.

V. HOSPITALS

Last year, in a case of first impression in Mississippi, *Lloyd v. Jefferson Davis Memorial Hospital,*[95] a doctor asked that the chancery court affirmatively require the hospital to grant him full membership on the medical staff of the hospital. The Mississippi Supreme Court, adopting the reasoning of a Fifth Circuit case,[96] held that the court will not substitute its judgment for that of the hospital board in determining whether a doctor should be denied staff privileges if the hospital's determination was fair, compatible with the hospital's responsibility, and unencumbered by irrelevant considerations.[97] Probably the most significant aspect of *Lloyd* is the practicality evidenced by the supreme court. With the ever-increasing number of appeals docketed each year, the court has no time to supervise the administrative procedures of hospitals. However, by emphasizing the necessity for fairness in the hospital board's determination, the Mississippi court in *Lloyd* has at least created a standard by which the hospital's administrative procedures must be governed.

VI. JURISDICTION

Two of the five cases[98] rendered by the 1977 Mississippi Supreme Court in the area of jurisdiction were of extreme importance. One case concerned section 147 of the Mississippi Constitution; the other involved construction of the Mississippi long-arm statute in a breach of contract action.

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[94] *Id.* at 833.

[95] 345 So. 2d 1046 (Miss. 1977).

[96] Sosa v. Board of Managers, 437 F.2d 173, 177 (5th Cir. 1971).

[97] 345 So. 2d at 1048.

[98] The other three cases are: John v. Mississippi, 98 S. Ct. 2541, 2552 (1978) (jurisdiction of two Choctaw Indians who were Mississippi residents and who committed crime of aggravated assault was in the United States District Court and not the Mississippi circuit courts); Celotex Corp. v. Campbell Roofing & Metal Works, Inc., 352 So. 2d 1316, 1319 (Miss. 1977) (jurisdiction relating to contribution is concurrently in court of law and court of equity); Martin v. Armstrong, 350 So. 2d 1353, 1355-58 (Miss. 1977) (absent a showing of fraud, circuit court has no authority to set aside a default judgment after the term of court has ended).

A. *Section 147 of the Mississippi Constitution*

Where jurisdiction of an action has not been expressly posited in either chancery or circuit court by statute or constitutional provision, and the defendant has not been deprived of a substantial right, section 147 of the Mississippi Constitution[99] precludes the supreme court's reversal solely on the ground that there was an error in the lower court's assumption of jurisdiction.[100] Furthermore, the court has, in the past, held that being deprived of trial by jury is not a denial of a substantial right.[101]

Last year, in *McLean v. Green,*[102] the chancery court erred in assuming jurisdiction over a personal injury action brought on behalf of two minors who were injured in an automobile-motorcycle collision. Although this case involved two minors, it required no equitable relief.[103] The *Green* court, noting that courts of equity should not assume jurisdiction over personal injury actions,[104] strongly criticized the chancellor's assumption of jurisdiction over this common law action.[105] Even though the chancellor's assumption of jurisdiction deprived appellant of the right to trial by jury, the court held that reversal could not be ordered solely on the grounds of want of jurisdiction.[106]

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[99] MISS. CONST. art. 6, § 147. See Comment, *Due Process of Law in Mississippi Courts: Implications of Erroneous Jurisdiction Under § 147 of the Constitution of 1890,* 41 MISS. L.J. 578, 578-84 (1970).

[100] McLean v. Green, 352 So. 2d 1312, 1314 (Miss. 1977). *See, e.g.,* Matthews v. Thompson, 231 Miss. 258, 290-91, 95 So. 2d 438, 452 (1957) (whether chancery court was in error in assuming jurisdiction over action for death and injuries resulting from automobile collision was immaterial since there were no other errors); McClendon v. Mississippi State Highway Comm'n, 205 Miss. 71, 79, 38 So. 2d 325, 327 (1949) (section 147 covers only cases where the trial court assumes jurisdiction; it does not cover cases where the trial court declines jurisdiction); Dilworth v. Federal Res. Bank, 170 Miss. 373, 389, 150 So. 821, 824 (1933) (if complaining party is denied a substantial right because of erroneous assumption of jurisdiction section 147 does not preclude review by state supreme court); Mississippi Power & Light Co. v. Ross, 168 Miss. 400, 407-08, 150 So. 830, 832 (1933) (section 147 inapplicable because the chancery court had no right under the facts to grant an injunction and injunction was the only relief which could be granted under the bill); Boyett v. Boyett, 152 Miss. 201, 208, 119 So. 299, 301 (1928) (state supreme court will affirm judgment in absence of any error other than want of jurisdiction); Talbot & Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 191, 113 So. 433, 434 (1927) (denial of trial by jury is not deemed denial of a substantial right); Hancock v. Dodge, 85 Miss. 228, 233, 37 So. 711, 711 (1905) (decree in chancery will not be reversed on mere ground that there was an adequate remedy at law); Board of Levee Comm'rs v. Brooks, 76 Miss. 635, 641, 25 So. 358, 359 (1899) (section 147 does not apply to a usurpation of jurisdiction where jurisdiction is expressly given to one court by statute or constitution); Cazeneuve v. Curell, 70 Miss. 521, 523, 13 So. 32, 32 (1893) (supreme court cannot reverse where sole error was want of jurisdiction).

[101] Talbot & Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 191, 113 So. 433, 434 (1927).

[102] 352 So. 2d 1312 (Miss. 1977).

[103] *Id.* at 1314.

It seems incredible that deprivation of the right to trial by jury is not deemed a denial of a substantial right. Section 31 of the Mississippi Constitution commands that the right to trial by jury shall remain inviolate.[107] In a 1927 Mississippi case,[108] Justice Ethridge wrote an excellent dissent[109] vigorously defending the right to trial by jury. Refusing to adopt the sound reasoning of Justice Ethridge, the *Green* court reasoned that since both sections 147 and 31 are part of the Mississippi Constitution, they should be construed together.[110] The end result of this construction is that the right to trial by jury does not remain inviolate in all instances because section 147 is applied to override the dictates of section 31. In most of the cases to which section 147 is applicable, the wrongful assumption of jurisdiction has at least a plausible basis for error; there is, however, much room for abuse.[111] It is not clear how the supreme court would react to a situation where a chancellor gave no plausible excuse for his error. Although the court in *Green* considered it an abuse of discretion for a chancellor to assume jurisdiction of a common law action, the court nonetheless declined to reverse the chancellor's decision.[112]

The logic of the Mississippi court in construing these constitutional provisions presents a serious problem. Since the *Green* decision conforms to the decisions of the past, and the supreme court evidenced no propensity to resolve the obvious conflict between sections 31 and 147, these provisions should be amended to avoid violation of the right to a jury trial.

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[104] *Id.; accord,* Evans v. Progressive Cas. Ins. Co., 300 So. 2d 149, 151-52 (Miss. 1974).

[105] 352 So. 2d at 1314.

[106] *Id.* at 1314-15.

[107] MISS. CONST. art. 3, § 31.

[108] Talbot & Higgins Lumber Co. v. McLeod Lumber Co., 147 Miss. 186, 113 So. 433 (1927).

[109] *Id.* at 192, 113 So. at 434; *see* Comment, *supra* note 99, at 583.

[110] 352 So. 2d at 1314.

[111] A traditional method of getting into chancery court is for the plaintiff to seek an attachment. *See* MISS. CODE ANN. § 11-31-1 (1972). *But see* Mississippi Chem. Corp. v. Chemical Constr. Corp., 444 F. Supp. 925, 942 (S.D. Miss. 1977) (holding Mississippi attachment statutes unconstitutional).

[112] 352 So. 2d at 1314.

B. *Mississippi's Long-Arm Jurisdiction*

Prior to the 1964 amendment to the long-arm statute, the Mississippi court's assumption of in personam jurisdiction of a nonresident defendant was dependent upon whether the defendant was "doing business" in Mississippi or whether it had "sufficient significant contacts" in the state to subject it to the jurisdiction of the Mississippi courts.[113] In addition, "traditional notions of fair play and of substantial justice" were not to be offended.[114] In a 1964 decision, *Mladinich v. Kohn,*[115] the court adopted a three factor analysis for determining whether a nonresident is doing business within the state. First, the nonresident defendant or foreign corporation must purposefully do some act or consumate some transaction in the forum state.[116] A second requirement is that the cause of action must arise from, or be connected with, such act or transaction.[117] Finally, the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice.[118] This last factor involves consideration of the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.[119]

In 1964, the Mississippi legislature amended the long-arm statute to confer jurisdiction over any nonresident defendant who enters into a contract to be performed in whole or in part with a resident of the state, and any nonresident defendant who commits a tort, in whole or in part, in this state against a resident of the state.[120] The statute, as amended in 1964, was first construed by the court in *Smith v. Temco, Inc.,*[121] a case involving a heater manufacturer domiciled in Tennessee who was not doing business in Mississippi.[122] In that case a defective heater purchased by a Mississippi resident[123] caused a fire that destroyed the resident's house.[124] The court adopted the reasoning of a federal court opinion involving similar facts[125] and allowed the manufacturer to be subjected to an in personam action for damages in Mississipi.[126] The court concluded that the legislature, in adopting the 1964 amendment, intended to extend the in personam jurisdiction of Mississippi courts to provide an effective means for the enforcement of rights accruing under the products liability doctrine.[127]

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[113] Brown & Scott, *In Personam Jurisdiction Under Mississippi's Long Arm Statute,* 43 Miss. L.J. 1, 11 (1972).

[114] Collins v. Truck Equip. Sales, Inc., 231 So. 2d 187, 188 (Miss. 1970); Hilbun v. California-Western States Life Ins. Co., 210 So. 2d 307, 310 (Miss. 1968); Republic-Transcon Indus., Inc. v. Templeton, 253 Miss. 132, 142, 175 So. 2d 185, 189 (1965); Breckenridge v. Time, Inc., 253 Miss. 835, 843, 179 So. 2d 781, 784 (1965); Mladinich v. Kohn, 250 Miss. 138, 148, 164 So. 2d 785, 790 (1964).

[115] 250 Miss. 138, 148, 164 So. 2d 785, 790 (1964); *see Significant Mississippi Cases,* 38 Miss. L.J. 1, 24-25 (1966).

[116] 250 Miss. 138, 148, 164 So. 2d 785, 790.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *See* Miss. Code Ann. § 13-3-57 (1972); Brown & Scott, *supra* note 113, at 11. *See generally* 37 Miss. L.J. 177 (1965).

[121] 252 So. 2d 212 (Miss. 1971).

[122] *Id.* at 213-14.

Last year, in *Miller v. Glendale Equipment & Supply, Inc.,*[128] the court once again construed the Mississippi long-arm statute.[129] In this case, Miller contracted to buy a bulldozer from Glendale Equipment & Supply, Inc., a foreign corporation which had never done business in Mississippi.[130] Pursuant to the contract of sale made over the telephone, Miller mailed a check for the purchase price of the bulldozer, and the bulldozer was subsequently delivered in a defective condition.[131] Miller sued for damages resulting from breach of contract, but the trial court dismissed the cause for lack of jurisdiction.[132]

The *Miller* court, viewing its prior decision in *Smith* as controlling,[133] held that the trial court had jurisdiction under the Mississippi long-arm statute.[134] Noting that other jurisdictions have adopted a similar construction,[135] the court made no distinction between the "making a contract" and "committing a tort" jurisdictional bases provided by the 1964 statutory amendment.[136]

Miller interprets the long-arm statute liberally, and expands the protection given to Mississippi residents. It should be noted, however, that a threshold issue in all cases involving nonresident defendants is whether the assertion of jurisdiction violates the requirements of due process as defined by decisions of the United States Supreme Court.[137] Furthermore, to determine which acts are sufficient to confer jurisdiction, the practitioner must still look to *Mladinich* for guidance. A plaintiff can rely upon *Miller* in a breach of contract action or *Smith* in a tort action to satisfy the first two requirements of the *Mladinich* "three factor" analysis. The third factor, however, involves the more difficult inquiry into the quality, nature, and extent of the activity in the forum state.

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[123] *Id.* at 213.

[124] *Id.*

[125] Dawkins v. White Prod. Corp., 443 F.2d 589 (5th Cir. 1971).

[126] 252 So. 2d at 215-16.

[127] *Id.*

[128] 344 So. 2d 736 (Miss. 1977).

[129] MISS. CODE ANN. § 13-3-57 (1972).

[130] 344 So. 2d at 737.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 737-38.

[134] *Id.* at 739.

[135] *See* Magee v. International Life Ins. Co., 355 U.S. 220, 221 (1957) (statute subjected "foreign corporations to suit in California on insurance contracts with residents of that state"); Electro-Craft Corp. v. Maxwell Elec. Corp., 417 F.2d 365, 365-66 (8th Cir. 1969) (where Minnesota buyer conducted negotiations for purchase of equipment from Texas seller by mail and telephone, contract was performed in part in Minnesota).

[136] 344 So. 2d 738.

VII. JUVENILES

In a 1968 Mississippi case,[138] an eleven year-old boy was committed to Oakley Training School for stealing a washpot valued at three dollars.[139] It was ordered that he remain at the training school until paroled or discharged, but in no event was he to remain there after he reached the age of twenty.[140] The undue harshness of such youth court orders certainly appears to violate the equal protection clause, and the Mississippi Supreme Court accordingly vacated the judgment.[141]

The Mississippi court decided three juvenile cases last year, two of which were of minor importance.[142] However, in a third decision, *In re Wilder,*[143] the court confronted disturbing issues involving the rights of juveniles. Wilder and two other thirteen-year-old boys, having been found guilty under the bomb threat statute,[144] were committed to Columbia Training School until they reached the age of twenty or until an order of the court mandated their release.[145] Appellants contended that the order of the court amounted to cruel and unusual punishment, potentially depriving them of their freedom for seven years. In contrast, such an offense committed by an adult carries a penalty not exceeding one year imprisonment in the county jail or $500 fine, or both.[146]

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[137] *See* Brown & Scott, *supra* note 131, at 48.

[138] Ford v. Grenada County Youth Court, 214 So. 2d 462 (Miss. 1968).

[139] *Id.* at 462.

[140] *Id.*

[141] *Id.* at 462-63.

[142] *In re* Evans, 350 So. 2d 52, 54-55 (Miss. 1977) (youth court judge can authorize filing of petition involving child allegedly guilty of burglary and can require the parents of delinquent to participate in guidance counseling); Burns v. State, 344 So. 2d 1189, 1190-91 (Miss. 1977) (state statute which precludes confinement except at one of two state hospitals for first offenders under twenty-one years of age held not applicable where petitioner had admitted that he had previously pleaded guilty to two similar offenses).

[143] 347 So. 2d 520 (Miss. 1977). For an overview of Mississippi law concerning juveniles and juvenile offenses, see Joyner & Maxey, *Juvenile Offenses: A Study of Adjudication and Disposition In Mississippi,* 42 MISS. L.J. 60 (1971); Note, *Constitutional Law—Application of Basic Constitutional Guarantees to Juveniles,* 39 MISS. L.J. 121 (1967).

[144] MISS. CODE ANN. § 97-37-21 (1972).

[145] 347 So. 2d at 522.

The *Wilder* court held that commitment to the training school was not cruel and unusual punishment.[147] Although it was held that the youth court judge did not abuse his discretion, the case was remanded with direction to hear additional evidence covering the period since the date of the order to determine whether the decision should be modified.[148] In reaching its decision, the court agreed with other jurisdictions that distinguish between the penal statutes and the juvenile delinquency statutes.[149]

An order from a youth court that potentially could deprive three thirteen year-old boys of their freedom for seven years, while the same offense by an adult carries a maximum of one year imprisonment, should be declared unconstitutional as violative of the equal protection clause of the fourteenth amendment. The order constitutes cruel and unusual punishment in violation of the eighth amendment of the United States Constitution[150] and section 26 of the Mississippi Constitution.[151] It seems anomalous that an adult may receive a more lenient punishment for committing the same offense, especially where, as in *Miller*, the youths had never been in any previous trouble, were members of good families, and were supervised and disciplined by their parents.[152]

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[146] *Id.* However, in Kotz v. United States, 353 F.2d 312, 314 (8th Cir. 1965), it was said:

> That a sentence under the Youth Corrections Act is not invalid because it may operate to subject a youthful offender to a longer period of restraint than that provided for in the offense-statute which he has violated, has been so repeatedly and uniformly held that the second ground of attack in appellant's motion was entitled to be treated as legally frivolous.

Id.; *see, e.g.*, Eller v. United States, 327 F.2d 639 (9th Cir. 1964) (upholding the constitutionality of the Federal Youth Corrections Act and its sentencing provisions); Rogers v. United States, 326 F.2d 56, 57 (10th Cir. 1963) (confinement is for the purpose of rehabilitation by treatment and not for punishment); Young Hee Choy v. United States, 322 F.2d 64, 66 (9th Cir. 1963) (upholding the constitutionality of sentencing provisions of Youth Corrections Act); Standley v. United States, 318 F.2d 700, 701 (9th Cir. 1963) (held that the Youth Corrections Act was constitutional); Cunningham v. United States, 256 F.2d 467, 472 (5th Cir. 1958) (no constitutional reason why Congress could not or should not make the general distinction between treatment of persons over and those under twenty-two years old).

[147] 347 So. 2d at 522.

[148] *Id.* at 523.

[149] *Id.* at 522; *see* McGann v. United States, 440 F.2d 1065, 1066 (5th Cir. 1971) (longer sentence under Youth Corrections Act than sentence provided in Dyer Act did not subject youthful offender to cruel and unusual punishment); United States v. Dancis, 406 F.2d 729, 730 (2d Cir. 1969) (sentencing defendant to an indeterminate sentence under the Youth Corrections Act was not cruel and unusual punishment).

[150] U.S. CONST. amend. VIII.

[151] MISS. CONST. art. 3, § 26.

[152] 347 So. 2d at 523.

VIII. LOCAL GOVERNMENT

The Mississippi Supreme Court analyzed several matters concerning local government last year. The seven cases rendered in this area, which warrant no textual discussion, cover matters such as local elections[153] and governmental immunity.[154] The 1977 supreme court also decided disputes arising from zoning classifications[155] and, in one case, the court scrutinized a motion to strike written objections to a proposed annexation.[156] Each of these cases lends stability to the existing decisional law in this area and helps provide an equilibrium essential to the functioning of local governmental entities.

IX. TAXATION

The 1977 supreme court decided seven cases in the area of taxation.[157] These cases, deemed of minor importance, cover exemptions[158] and uniformity of assessments and liability.[159] Since they merit no lengthy discussion in this commentary, these cases are dealt with parenthetically.

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[153] Howard v. Crider, 341 So. 2d 477, 478-79 (Miss. 1977) (election held invalid where petition requesting election on sale, distribution, storage and possession of "alcoholic liquors" in county did not authorize county board of supervisors to call election as to whether wine and beer should be permitted); O'Neal v. Simpson, 350 So. 2d 998, 1009-11 (Miss. 1977) (en banc) (before any voter may receive assistance in marking his ballot, he must be either blind, physically disabled or illiterate; if such rule is violated a new election may be ordered if a sufficient number of illegal votes were cast which would change the result or leave it in doubt), *cert. denied,* 98 S. Ct. 1510 (1978); Smith v. Granberry, 349 So. 2d 555, 558 (Miss. 1977) (election result upheld where election officials discovered, after ten persons had voted, that candidates for the board of education were not listed, and, subsequently, nine of the ten voters revoted on the correct ballots).

[154] Berry v. Hinds County, 344 So. 2d 146, 147-51 (Miss. 1977), *cert. denied,* 98 S. Ct. 114 (1977) (state supreme court declined to abolish governmental immunity in suit brought against county for injuries suffered when plaintiff's automobile crashed into a collapsed bridge).

[155] City of Jackson v. Shell Oil Co., 347 So. 2d 340, 340-41 (Miss. 1977) (city had no authority to change the zoning status of property where no material change in circumstances was shown since last zoning order, and when property owner made timely petition to maintain the status of his property); Cowan v. Gulf City Fisheries, Inc., 344 So. 2d 724, 724-25 (Miss. 1977) (writ of mandamus requiring city clerk to change zoning classification should not have been issued to property owner because available administrative remedies were not utilized).

[156] *In re* City of Pascagoula, 346 So. 2d 904, 905 (Miss. 1977) (interlocutory appeal from chancellor's order overruling city's motions to strike written objections to proposed annexation was improvidently granted since the record had no proof bearing upon the reasonableness of the proposed annexation).

[157] Brady v. John Hancock Mut. Life Ins. Co., 342 So. 2d 295 (Miss.), *cert. denied,* 98 S.Ct. 32 (1977), concerns taxation but is included and discussed under the topic of constitutional law rather than taxation.

[158] In City of Jackson v. Desoto, Inc., 350 So. 2d 684 (Miss. 1977), the court held that when a manufacturer is granted an exemption on a new building pursuant to a state statute providing exemptions for additional or expanded manufacturing facilities, such exemption is lost when the manufacturer leases the new building to another corporation

X. WILLS, ESTATES, AND TRUSTS

The Mississippi Supreme Court decided eleven cases[160] last year in

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for use as a free port warehouse. The city may not, however, back assess the manufacturer for the amount of the exemptions previously given since the statute is neither retrospective nor penal in nature. *Id.* at 685-86. The court also held that when the Mississippi Tax Commission issues a license qualifying a corporation as a free port warehouse pursuant to state statute, the city may not revoke that license and assess an ad valorem tax when it finds the corporation did not comply with Tax Commission regulations since the statute expressly provides for revocation "by the state tax commission." *Id.* at 687-88. In Communications Improvement, Inc. v. Mississippi State Tax Comm'n, 349 So. 2d 535 (Miss. 1977), the appellant television station was held not to be exempt from paying state income taxes on its net profits since it did not meet the statutory requirements of being organized or operated exclusively for educational purposes. *Id.* at 536-38. In City of Jackson v. Sly, 343 So. 2d 473 (Miss. 1977), the court ruled that exemption statutes are to be strictly construed against exemptioners and exemptions are only applicable "prospectively" to taxes unlevied at the time of the exemption. *Id.* at 474-76.

[159] In Board of Supervisors v. Standard Oil Co., 353 So. 2d 1137 (Miss. 1977), the evidence was sufficient to create a jury question as to whether assessments against appellee's property were uniform and equal with the assessments of other property of like kind and character in Jackson County as required by the Mississippi Constitution. *Id.* at 1141. In Fondren v. State Tax Comm'n, 350 So. 2d 1329 (Miss. 1977), the taxpayer, seeking to enjoin the State Tax Commission from approving county recapitulation of assessment rolls until the Commission complied with its statutory and constitutional duty to equalize assessments among counties, had standing since the complaint stated a cause of action and the taxpayer did not have an adequate remedy at law. *Id.* at 1332-35. In Wilson v. Jones County Bd. of Supervisors, 342 So.2d 1293 (Miss. 1977), the court held that singling out Jones County for different tax treatment by reference to its highways and population did not bear a rational relationship to the purpose of the statute, and therefore violates the Mississippi Constitution which requires uniform and equal taxation throughout the state. *Id.* at 1295-96. For a discussion of ad valorem taxation in Mississippi, see Robertson, *Problems of Valuation and Equalization in Mississippi's Ad Valorem Tax System,* 48 MISS. L.J. 201 (1977).

[160] In Fowler v. Fisher, 353 So. 2d 497 (Miss. 1977), the court ruled that in a will contest, issues of undue influence and testamentary capacity are for the jury since its role is the same as in a civil trial at law and is not merely advisory. *Id.* at 497-99. In Deposit Guar. Nat'l Bank v. First Nat'l Bank, 352 So. 2d 1324 (Miss. 1977), the court, in construing a testamentary trust, reiterated the principle that the "paramount and controlling consideration is to ascertain and give effect to the intention of the testator." *Id.* at 1327. In Longtin v. Witcher, 352 So. 2d 808 (Miss. 1977), where the decedent had made valid inter vivos gifts and conveyances of real and personal property to a woman who had taken care of him during the years of his failing health, the court held the transfers were not made as a result of undue influence. *Id.* at 811-12. In Davion v. Williams, 352 So. 2d 804 (Miss. 1977), the court ruled that where the alleged confidential relationship is that between next door neighbors, it is reversible error to grant an instruction imposing a presumption of undue influence requiring clear and convincing evidence to overcome

the area of wills, estates, and trusts, making no significant changes in this field. Most of the cases were decided on the basis of statutory construction or on questions of fact. However, one relatively important decision, *Fowler v. Fisher,*[161] cleared up any doubt that may have existed concerning the role of a jury in a will contest in chancery. The court in *Fowler* stated that the jury's role in a will contest is the same as that of a jury in a civil trial and is not merely advisory.[162]

XI. CONCLUSION

Many of the decisions rendered by the court last year and covered in this commentary have minor significance beyond maintaining a semblance of consistency in our jurisprudence. Even so, the 1977 Mississippi Supreme Court pinpointed many areas in which changes are desperately needed. In addition to the decisions formulating standards to govern administrative procedures of local governmental entities[163] and

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without first submitting to the jury the factual issue as to the existence of a confidential relationship. *Id.* at 807-08. In Johnson v. Robinson, 351 So. 2d 1339 (Miss. 1977), a widow's contract not to renounce her husband's will was held unenforceable since the benefits she would receive under the laws of descent and distribution greatly outweighed the consideration for her promise not to renounce, and since the circumstances surrounding the execution of the agreement showed bad faith on the part of her late husband. *Id.* at 1342. In Jefferson v. Moore, 349 So. 2d 1032 (Miss. 1977), the court ruled that an attestation by telephone conversation is not in the presence of the testator as required by state statute. *Id.* at 1033-36. In Smith v. Hinton, 349 So. 2d 519 (Miss. 1977), the court held that a widow's testimony that she was the donee of a life insurance policy during her husband's lifetime was not incompetent under the Dead Man's Statute since this claim did not directly affect the estate of the decedent. *Id.* at 512. In Batchelor v. Powers, 348 So. 2d 776 (Miss. 1977), a typewritten document signed by the decedent but not by two witnesses was properly refused admission to probate since it did not meet the statutory requirements. *Id.* at 776-78. In Ramsey v. Robinson, 346 So. 2d 379 (Miss. 1977), the court held that after a holographic will is revoked by the execution of a valid subsequent will, it cannot be revived by the testator's inscribing a later date on the previously revoked holographic will since the inscribing is neither a republication of the holographic will nor a revocation of the later will. *Id.* at 380-81. In Foster v. Foster, 344 So. 2d 460 (Miss. 1977), an individual who was reared by husband and wife, both deceased, was held to be the lawful heir of the husband based upon a sworn birth certificate, school records listing decedents as claimant's parents, and a warranty deed by the husband acknowledging the claimant as his son, notwithstanding that the birth certificate was delayed twelve years after birth of the claimant, and that the husband's brothers and sisters and witnesses introduced by them testified that claimant was the child of another. *Id.* at 462. In Jeter v. Culp, 343 So. 2d 1226 (Miss. 1977), the court ruled that nephews who benefited from a trust did not exercise undue influence over the settlor in light of evidence of the settlor's strong will, evidence that he was a careful and conservative businessman, and testimony by attorneys that they drew the trust agreement following the settlor's specific request and instructions. *Id.* at 1228.

[161] 353 So. 2d 497 (Miss. 1977).

[162] *Id.* at 501.

[163] See notes 153 through 156 and accompanying text *supra.*

hospitals,[164] the court ventured into the maze of long-arm jurisdiction in a decision that will certainly aid in bringing nonresidents within this state's jurisdiction.[165] The court failed, however, to resolve the inconsistency inherent in our state constitution[166] that works to deprive defendants of the right of jury trial.[167]

In the year's most disturbing opinion, the court continued to allow the disparate treatment of juveniles and adults convicted of similar offenses.[168] The court will have to modernize its attitude in future decisions involving juveniles to align itself with modern trends in this area and to conform to the dictates of reality.

Richard Edwin Ulmer

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[164] See notes 95 and 96 and accompanying text *supra*.

[165] See notes 113 through 137 and accompanying text *supra*.

[166] See notes 107 through 112 and accompanying text *supra*.

[167] See notes 100 & 102 through 106 and accompanying text *supra*.

[168] See notes 138 through 152 and accompanying text *supra*.

COMMENT

THE VIABILITY OF A TAX SHELTER VEHICLE: LIMITED PARTNERSHIPS WITH A CORPORATION AS SOLE GENERAL PARTNER

Tax shelters have attracted the attention of taxpayers because through them, a relatively small investment in highly leveraged property can produce "artificial" losses substantially in excess of the investment.[1] The most significant benefit provided by tax shelters is the creation of sizable tax losses which allow the partners to shield other income from federal taxation, even though the venture itself generally produces a positive cash flow.[2]

The limited partnership is the most commonly used tax shelter vehicle because it affords limited liability to the limited partners, it lends itself to syndication, and, most importantly, it acts as a conduit for tax shelter deductions.[3] A limited partnership must have at least one

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[1] Under I.R.C. § 752, a partner's basis in his partnership interest is increased by his share of the partnership liabilities. Thus, for a relatively small cash investment, a partner may receive large deductions based on his total investment as well as his share of the liabilities. For example, an investment of $10,000 for a ten percent interest in real property encumbered by a $900,000 mortgage produces a basis in the partnership interest of $100,000 ($10,000 investment plus ten percent of $900,000). This becomes the available basis for the absorption of deductions such as depreciation and interest expenses.

In a limited partnership, however, a limited partner's share of liabilities is limited to the amount of his obligation under the partnership agreement in addition to the actual investments already made. Thus, his basis in his partnership interest cannot exceed the total of his actual investment plus any further contributions to capital mandated by the partnership agreement. Treas. Reg. § 7.752-1(e) (1956). Where none of the partners has any personal liability, all partners, including limited partners, share in the partnership liability for purposes of determining individual bases in partnership interests. In such cases, shares in liability are based on shares in profits rather than losses. *Id.* Nonrecourse financing therefore enables limited partners to increase their bases while limiting their exposure to creditors. 1 A. Willis, Partnership Taxation § 22.03, at 250-53 (2d ed. 1976 & Supp. 1977).

[2] 2 A. Willis, *supra* note 1, § 59.01, at 161-62, § 63, at 193-211. Willis discusses the following areas of tax sheltering: leasing equipment or real property, real estate oil and gas, cattle feeding, cattle and horse breeding, farming, citrus and almond groves, motion pictures, low and moderate income housing, tax exempt bonds, partnership swap funds, and sport franchises. *Id.* § 63, at 193-211.

[3] 2 Z. Cavitch, Business Organizations § 39, at 1024-1100.65 (1975 & Supp. 1977); 2 A. Willis, *supra* note 1, §§ 54-67, at 123-224. Willis sets forth five principal characteristics of tax shelter partnerships:

> (1) The partnership is merely a conduit for transmitting to partners the various items, or classes of items, of income, gain, loss, deduction, and credit.
>
> (2) Depreciation may shield from income tax the cash flow income from an investment in depreciable property. If accelerated depreciation is used, the

general partner who is personally liable for the debts of the organization.[4] Because the limited partners are liable to creditors only to the extent of their investment, the general partner's risk may be a heavy financial burden. For this reason, the obvious advantage of using a corporation as sole general partner is to establish a limit to the liability of the general partner.[5]

Since 1970, the Internal Revenue Service has attacked the limited partnership tax shelter but, to date, its attempts to eliminate the shelter's availability have been largely unsuccessful. The thrust of the IRS attack has been directed toward the judicial classification of the limited partnership as a partnership, instead of as a corporation, for the purposes of income taxation.[6] This classification standard is the most significant reason the limited partnership tax shelter maintains viability today.

This Comment will attempt to set forth and analyze the past and present status of the limited partnership with a corporation as sole general partner, with an additional inspection of those factors that continue to threaten its existence as a tax shelter vehicle. After detailing the legality of the organization under state law, the background section analyzes the extensive controversy that evolved from the Treasury Regulations' determinative criteria for partnership versus corporate classification. The existing controversy is further illustrated by recent court decisions, and the resultant attempt by the IRS to amend those Treasury Regulations it felt had dictated the position taken by the courts in this area.[7] Additionally, the effects of congressional reform of the spe-

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depreciation deduction may be available to shield income from other sources.

(3) Front end expenses for prepaid interest, prepurchased feed for livestock, and the like give a large initial deduction to tax shelter investors.

(4) In a limited partnership the utilization of nonrecourse loans makes it possible for limited partners to obtain income tax deductions substantially in excess of their investments in the tax shelter partnership.

(5) Even if the investors have to report "phantom gain" when they dispose of their interests in tax shelter partnerships, they have the advantage of using tax money on an interest free basis for a period. Further, this provides an opportunity to level out the peaks and valleys in income of some taxpayers.

Id. § 59.01, at 161-62.

[4] UNIFORM LIMITED PARTNERSHIP ACT §§ 1, 9.

[5] 1 Z. CAVITCH, *supra* note 3, § 9.03[6], at 448-49.

[6] *E.g.*, Zuckman v. United States, 524 F.2d 729 (Ct. Cl. 1975); Larson v. Commissioner, 66 T.C. 159 (1976) (appeal to the Ninth Circuit withdrawn January 15, 1978). Taxation as a partnership permits the pass through of loss benefits which are not available through treatment as a corporation. 1 A. WILLIS, *supra* note 1, §§ 1.02-.03, at 6-12, §§ 1.06-.07, at 17-20.

[7] See notes 132 through 153 and accompanying text *infra*.

cific benefits that make tax shelters so attractive, instigated by the Tax Reform Act of 1976,[8] will be examined.

I. A Permissible Entity Under Mississippi Law

An examination of Mississippi law reveals that a corporation may serve as the sole general partner in a limited partnership.[9] Mississippi has adopted the Uniform Limited Partnership Act (ULPA),[10] as well as the Uniform Partnership Act (UPA).[11] Section 79-13-3 of the Mississippi Code defines a limited partnership as a partnership that is formed by two or more "persons" under section 79-13-5 and that has at least one general partner and one limited partner.[12] Section 79-13-5 sets forth the required contents of the formation certificate for a limited partnership, and subsection (1)(o) defines the word "person" to include "individuals, partnerships, corporations, and other associations."[13] Additionally, under the Mississippi Business Corporation Law, section 79-3-7(g) states that every corporation shall have the power to purchase and hold interests in partnerships.[14] It follows from this analysis that the limited partnership with a corporation as the sole general partner constitutes a viable legal entity in Mississippi.

II. Background

A limited partnership can function as a tax shelter vehicle *only* if it is classified as a partnership for income tax purposes; classification as a corporation will destroy the tax shelter benefits.[15] Section 7701 of the Internal Revenue Code defines the term "corporation" to include "associations" for taxation purposes,[16] and past decisional law has recognized that a limited partnership may, under certain circumstances, be classified as an association.[17] Because classification as an association is equivalent to classification as a corporation, the tax shelter benefits of a limited partnership classified as an association are effectively destroyed.

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[8] Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified in scattered sections of I.R.C. (1954)). See notes 154 through 177 and accompanying text *infra.*

[9] Miss. Code Ann. §§ 79-13-3, -5(1)(o) (1972) (limited partnership formed by two or more persons who may be corporations). *See generally* Stein, *Partnership Taxation for the Limited Partnership with a Corporate General Partner—It Can Be Done,* 25 U. Miami L. Rev. 435 (1971).

[10] Miss. Code Ann. §§ 79-13-1 to -137 (1972). *See generally* Comment, *Mississippi Uniform Limited Partnership Act,* 45 Miss. L.J. 1037 (1974).

[11] Miss. Code Ann. §§ 79-12-1 to -85 (Supp. 1977).

[12] *Id.* § 79-13-1 (1972).

[13] *Id.* § 79-13-5(1)(o). The definition comes from the Uniform Partnership Act § 2, rather than the Uniform Limited Partnership Act § 2, which lacked any such definition. If the Uniform Partnership Act had been first adopted in Mississippi, its definition would have applied to limited partnerships and Miss. Code Ann. § 79-13-5(1)(o) (1972) would have been unnecessary.

[14] Miss. Code Ann § 79-3-7(g) (1972).

[15] Partnership classification allows for the pass through of income, expenses, and losses, directly to the investors. To this extent the partnership acts merely as a conduit. On the other hand, the losses of a corporation do not pass through to the investors since the corporation is considered a separate taxable entity. 2 A. Willis, *supra* note 1, §§ 54-55, at 123-33.

In the case of *Morrissey v. Commissioner,*[18] the United States Supreme Court first expounded the criteria for determining when an unincorporated entity would be held taxable as an association. The Court applied an overall resemblance test[19] from examination of the following critical characteristics designating corporate tax status: (1) the existence of centralized management through representatives of the members, (2) security from termination or interruption due to the death of owners of beneficial interests, (3) the organization must facilitate the transfer of beneficial interests and the introduction of large numbers of participants without affecting the continuity of the enterprise, and (4) the limitation of personal liability.[20] These four corporate characteristics became the foundation of the current regulations regarding the tax status of business organizations.[21]

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[16] I.R.C. § 7701(a)(3). The term "partnership" is defined in *id.* § 7701(a)(2).

[17] Giant Auto Parts, Ltd. v. Commissioner, 13 T.C. 307, 318 (1949); *see* Glensder Textile Co. v. Commissioner, 46 B.T.A. 176, 187 (1942) (recognizing that some limited partnerships may properly be classified as associations).

[18] 296 U.S. 344, 360 (1935).

[19] The Court stated, "The inclusion of associations with corporations implies resemblance; but it is resemblance and not identity. The resemblance points to [the] features distinguishing associations from partnerships as well as from ordinary trusts." *Id.* at 357.

[20] *Id.* at 359. *Morrissey* also designated a fifth characteristic—the ability to hold title to property. Nevertheless, this characteristic cannot be considered critical because partnerships can hold title to property, *e.g.,* MISS. CODE ANN. § 79-12-15(3) (Supp. 1977), in the same manner as corporations, *e.g., id.* § 79-3-7(d) (1972).

[21] Treas. Reg. § 301.7701-2(a)(1) (1961) lists six characteristics of corporations: "(i) associates, (ii) an objective to carry on business and divide the gains therefrom, (iii) continuity of life, (iv) centralization of management, (v) liability for corporate debts limited to corporate property, and (vi) free transferability of interest." However, characteristics (i) and (ii) are ignored in distinguishing between partnerships and corporations, since both organizations possess these attributes. *Id.* § 301.7701-2(a)(3). Thus, four critical characteristics remain: (1) continuity of life, (2) centralized management, (3) limited liability, and (4) free transferability of interests. The regulations also mention that "[i]n addition to the major characteristics set forth in this subparagraph, other factors may be found in some cases which may be significant in classifying an organization as an association, a partnership, or a trust." *Id.* § 301.7701-2(a)(1).

Furthermore, the regulations specifically cite *Morrissey* and state, "An organization will be treated as an association if the corporate characteristics are such that the organization more nearly resembles a corporation than a partnership or trust." *Id.* Two paragraphs later, the regulations set forth a preponderance test for resemblance, stating, "[A]n

The current regulations, promulgated in 1960,[22] were not issued with the intention of restricting the limited partnership tax shelter. Ironically, the regulations were originally issued in an attempt to preclude the classification of professional service associations as corporations. The motivating force behind the issuance of the new regulations was provided by the Ninth Circuit in *United States v. Kintner,*[23] where the court upheld the corporate classification of an associated group of doctors.[24] In response to that holding, the current regulations were drafted, and in an attempt to defeat corporate classification of professional service organizations, the new regulations heavily favored a finding of partnership status.[25]

These regulations, subsequently entitled the Kintner regulations, set forth four critical characteristics of corporations: (1) continuity of life, (2) centralization of management, (3) limited liability, and (4) free transferability of interests.[26]

Additionally, the regulations state that other significant factors may be considered in determining the classification of an organization.[27] Exemplifying the bias of the Kintner regulations towards a determination of partnership status, the regulations further require that for an unincorporated organization to be classified as a corporation, it must have more corporate than noncorporate characteristics. In effect, a preponderance test is created, where a two to two split results in a noncorporate designation.[28]

In 1965, the IRS amended the regulations in an attempt to strengthen its attack on the corporate tax classification of professional service associations.[29] However, the courts consistently rejected the IRS position by ruling that the amended regulations were unreasonable.[30] By

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unincorporated organization shall not be classified as an association unless such organization has more corporate characteristics than noncorporate characteristics." *Id.* § 301.7701-2(a)(3).

[22] *Id.* § 301.7701-1, -2.

[23] 216 F.2d 418 (9th Cir. 1954).

[24] *Id.* at 424. The growth of professional service corporations, especially for doctors and lawyers, resulted from the advantages of qualified pension and profit-sharing plans available to corporations, but unavailable to partners in a partnership. *See generally* I.R.C. § 401(c), (d).

[25] Treas. Reg. §§ 301.7701-2(b)(3), -2(c)(4), -2(d)(1) (1961); Fisher, *Classification Under Section 7701—The Past, Present and Prospects for the Future,* 30 TAX LAW. 627, 630 (1977); Mendenhall & Ferguson, *What Risks Now for Partnership Treatment of Shelters? Lessons of Larson, Zuckman,* 45 J. TAX. 66, 68 (1976).

[26] Treas. Reg. § 301.7701-2 (1961). See note 21 *supra.*

[27] Treas. Reg. § 301.7701-2(a)(1) (1961).

[28] *Id.* § 301.7701-2(a)(3).

[29] *Id.* § 301.7701-2(h) (1965).

[30] *E.g.,* Kurzner v. United States, 413 F.2d 97, 112 (5th Cir. 1969); O'Neil v. United States, 410 F.2d 888, 899 (6th Cir. 1969); United States v. Empey, 406 F.2d 157, 170 (10th

1970, the IRS had eventually acquiesced in the view prevalent among the courts that professional service organizations meeting the Kintner regulations' test would be classified as corporations for taxation purposes.[31] Having lost its war against the professional service corporations, the IRS turned its assault against the limited partnership tax shelter.[32]

III. ADVANCE RULINGS

The initial form of attack against limited partnership tax shelters appeared in restrictive requirements for the issuance of advance rulings.[33] Advance rulings allow investors, prior to the formation of an organization, to receive assurance from the IRS concerning the tax clas-

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Cir. 1969). Generally, these cases concluded that the 1965 regulations were unreasonable. In *Kurzner,* Judge Gewin condemned the regulations as based on "a tax-dollar school of statutory construction" and described them as "arbitrary, discriminatory, and legislative in nature." 413 F.2d at 111-12.

[31] Rev. Rul. 70-101, 1970-1 C.B. 278.

[32] At this juncture the IRS was faced with two dichotomous positions. The IRS could not successfully argue these positions concurrently, since one attacked corporate treatment of professional service organizations while the other threatened limited partnerships with corporate tax treatment, even though both organizations were in compliance with the IRS regulations. Consequently, the IRS was unable to make an attack on the limited partnership tax shelters until the litigation concerning professional service corporations had ended.

The IRS assault was directed toward those benefits not intended by Congress to be available to taxpayers. In 1976, the IRS issued a tax shelter training manual for revenue agents in which the service identified three areas of tax shelter benefits: "(1) deferral, (2) leverage, and (3) conversion." INTERNAL REVENUE SERVICE, UNITED STATES DEPARTMENT OF THE TREASURY, OVERVIEW OF TAX SHELTERS 1 (1976). Therefore, tax shelters may provide benefits either (1) by deferring or postponing taxes, (2) by providing "leverage" through accelerated deductions on investment capital which is borrowed, or (3) by changing ordinary income into capital gains. *Id.* Acknowledging that Congress intended certain of these benefits in some situations, the manual indicated that "legitimate shelters" are not the object of the service's assault. *Id.* In an attempt to distinguish the legitimate shelters, the manual described a three-fold classification for loss returns:

> CLASS I GOOD SHELTERS: Loss returns which are perfectly legitimate in all respects: economic, form, substance, etc.
>
> CLASS II PROBLEM SHELTERS: Loss returns which may contain on their face "elements" or items which were incorrectly handled, i.e., capitalizable items claimed as current deductions, etc., but in other respects are economically viable.
>
> CLASS III ABUSIVE SHELTERS: Loss returns which lack economic reality or viability in varying degrees. For defining this area, any transaction that fails to produce a return relative to the risk involved is suspect. Many factors interact in this determination.

Id. at 2.

[33] The IRS exercises discretion in issuing advance rulings and determination letters. *E.g.,* Rev. Proc. 72-9, 1972-1 C.B. 719. *Id.* 72-3, 1972-1 C.B. 698 lists several of the areas in which the IRS will not ordinarily issue rulings.

sification of the organization.[34] Revenue Procedure 72-13,[35] issued in 1972, required that four conditions be met before a limited partnership with a corporation as sole general partner can receive a favorable advance ruling: (1) limited partners cannot own more than twenty percent of the stock of the general partner;[36] (2) the general partner must meet substantial net worth requirements;[37] (3) there can be no mandatory or discretionary purchase requirements in securities of the general partner in securing a limited partnership interest;[38] and (4) there must be compliance with state laws governing limited partnerships.[39] Furthermore, a limited partnership having a corporation as its sole general partner will be ruled a partnership for advance ruling purposes only if all four conditions are satisfied.[40]

In 1974, the IRS made it increasingly difficult to obtain advance rulings on the tax status of limited partnerships[41] by imposing three additional criteria: (1) the distributive shares of the general partners must include at least one percent of each item of partnership income, gain, loss, deduction or credit;[42] (2) the distributive shares of partnership losses claimed by partners as deductions in the first two years of a partnership's operation ordinarily may not exceed the capital contributions of the partner;[43] and (3) persons making nonrecourse loans to the partnership ordinarily may not have any interest in the partnership or its property, other than as creditors.[44] Furthermore, the IRS will not rule on the effect of any transaction which has as "its principal purpose the reduction of federal taxes."[45]

The restrictive requirements for advance rulings[46] set forth in Revenue Procedures 72-13 and 74-17 are far more stringent than the actual regulations, and no obvious relationship exists between these conditions and the general requirements of the regulations.[47] It should be noted, however, that the above revenue procedures apply only in determining whether an advance ruling will be issued and are not intended to be used in making substantive determinations of partnership status.[48] Therefore, a limited partnership with a corporation as sole general partner may still qualify as a partnership without receiving or meeting the requirements for an advance ruling.[49]

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[34] Nevertheless, many limited partnerships must exist for more than three years before full tax-shelter benefits can be realized. Fisher, *supra* note 25, at 622.

[35] 1972-1 C.B. 735.

[36] *Id.* § 2.01.

[37] *Id.* §§ 2.02-.04.

[38] *Id.* § 2.05.

[39] *Id.* § 2.06.

[40] *Id.* § 2.

[41] Rev. Proc. 74-17, 1974-1 C.B. 428.

[42] *Id.* § 3.01.

[43] *Id.* § 3.02.

[44] *Id.* § 3.03.

[45] *Id.* § 2.01 (citing Rev. Proc. 72-9, 1972-1 C.B. 719).

[46] For a detailed analysis of the relationship between the revenue procedures and the regulations, see Sperling & Lokken, *The Limited Partnership Tax Shelter: An Investment Vehicle Under Attack,* 29 U. Fla. L. Rev. 1 (1976).

[47] Fox & Halperin, *A Corporate General Partner in Limited Real Estate Partnerships,*

IV. RECENT DECISIONS

In two recent cases, *Zuckman v. United States*[50] and *Larson v. Commissioner,*[51] the courts undertook an indepth analyses of the Kintner regulations as they apply to the limited partnership with a corporation as sole general partner. In each case, the courts refused to accept the IRS's contention that the limited partnerships involved should be classified as corporations, and upheld the organizations' partnership tax status.[52]

In *Zuckman,* Towne House was a limited partnership[53] formed under the Missouri ULPA.[54] Forest Park Corporation was the sole general partner in the Towne House partnership. Forest Park was capitalized at only $500 and had no substantial assets besides its Towne House interest. Also, the corporation was not involved in any activities other than those closely related to the operation of Towne House. Forest Park was controlled and indirectly wholly-owned by one of the limited part-

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3 J. REAL ESTATE TAX. 425, 430 (1976); Sperling & Lokken, *supra* note 46, at 9. Implicit in the statement made in the text is the view that the primary purpose of these difficult conditions is possibly one of deterrence.

[48] Rev. Proc. 74-17, 1974-1 C.B. 438, § 4.

[49] *E.g.,* Zuckman v. United States, 524 F.2d 729, 744-45 (Ct. Cl. 1975); Larson v. Commissioner, 66 T.C. 159, 185 (1976).

[50] 524 F.2d 729 (Ct. Cl. 1975).

[51] 66 T.C. 159 (1976) (appeal to the Ninth Circuit withdrawn January 15, 1978). For a discussion of the effect of the withdrawn appeal, see note 181 and accompanying text *infra.*

[52] 524 F.2d at 745; 66 T.C. at 185.

[53] 524 F.2d at 732. As of March 31, 1968, the partners of Towne House and their respective interests were:

Partner	*Interest (percent)*
Forest Park of Missouri, Inc.	61.8
J. H. Kanter	21.8
Robert Blatt	1.0
George Zuckman—Plaintiff	1.0
Others	14.4
Total	100.0

Id. (percentages rounded to nearest tenth).

[54] MO. REV. STAT. §§ 359.010-.290 (1969).

ners in Towne House.[55] Towne House constructed and operated an apartment building which was financed by a loan of $7,873,300 secured by a deed of trust, and insured by the Federal Housing Administration pursuant to an FHA regulatory agreement. This agreement required FHA approval prior to any voluntary dissolution of Towne House, provided the property remained subject to the FHA insured mortgage. Additionally, the agreement set forth that none of the partners in Towne House would be exposed to personal liability on the loan. For the tax year in question, Towne House accrued a net operating loss of $1,050,759.[56] For taxation purposes, the IRS determined that the development group was classifiable as an association, rather than a partnership, and as such, the partners were precluded from deducting their portion of the organization's loss. Subsequent to this determination an appeal ensued, and the Court of Claims concluded that Towne House in fact lacked all four major corporate characteristics pronounced by the Kintner regulations[57] and should therefore be designated as a partnership for taxation purposes.[58]

The *Larson*[59] case presented a far more difficult and complex determination for the court. In *Larson,* Grubin, Horth & Lawless, Inc. (GHL) was a California corporation, organized under that state's modified ULPA.[60] GHL was created primarily to organize tax sheltered real estate syndications, and was the sole general partner in two limited partnerships, Mai-Kai[61] and Somis.[62] The net worth of GHL during the years in question ranged between $49,593 and $18,764, with cash on hand generally being negligible. None of the limited partners held any substantial stock in GHL.[63] GHL invested no funds in the partnerships and its interests were subordinated to those of the limited partners.[64] Additionally, GHL marketed the limited partnership "units" as securities,[65] which were to exist for a limited period of time unless extended.[66] The limited partners had the right to transfer their interests, subject to certain restrictions,[67] and they had the right to remove the general partner.[68]

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[55] J. H. Kantner, the limited partner who controlled Forest Park, also owned the Kantner Corporation and received authorization from its directors to vote its stock by proxy in electing the directors for Forest Park. 524 F.2d at 731.

[56] *Id.* at 732. For the fiscal year ending March 31, 1968, the year in question, Towne House took deductions for depreciation of $533,302 and for interest of $426,333. George Zuckman, the plaintiff, had contributed a total of $7,500 to Towne House for his limited partnership interest of approximately 1% as of March 31, 1968. His distributive share of Towne House's loss for that year was $10,655. *Id.*

[57] *Id.* at 734-44.

[58] *Id.* at 745.

[59] 66 T.C. 159 (1976).

[60] Cal. Corp. Code §§ 15501-15531 (West 1977).

[61] Mai-Kai owned and operated the Mai-Kai Apartments, a student apartment complex in Arcata, California, purchased for $450,000 in 1968. 66 T.C. at 162.

[62] Somis Orchards (Somis) was formed "for the purpose of acquiring, holding, operating, improving, leasing, selling, and otherwise managing approximately 265 acres of citrus groves and related assets in Ventura County, Calif." The citrus groves were purchased in 1969 for $3,620,000, by virtue of a $102,750 cash down payment with the balance payable in three installment, nonrecourse notes. *Id.* at 166.

[63] Only Harris E. Lawless was both a limited partner and a shareholder in either Somis or Mai-Kai. *Id.* at 170.

Both Mai-Kai and Somis sustained losses during the years in question.[69] The IRS challenged the propriety of the loss deductions by the limited partners, asserting that the losses could not pass through to the taxpayers because the limited partnerships should be classified as associations, taxable as corporations.[70] Before the Tax Court, the sole issue was whether the limited partnerships constituted associations taxable as corporations.[71] In its first opinion,[72] the court held for the IRS, finding both Mai-Kai and Somis taxable as corporations. However, this opinion was withdrawn seventeen days later,[73] and a second *Larson* opinion was issued on April 27, 1976,[74] reversing the earlier decision and conversely holding that the limited partnerships were taxable as partnerships. The court recognized that although the limited partnerships possessed the corporate characteristics of centralized management and free transferability of interests, they lacked continuity of life and limited liability. Thus, because only two of the four corporate characteristics were present, the court concluded that they were properly taxable as partnerships under the Kintner regulations.[75]

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[64] *Id.* at 163-64, 168. GHL did not participate in cash flow or profits until after the limited partners had been repaid their after-tax investments. GHL did, however, receive management fees for managing and administering the partnership properties, a mortgage loan fee for obtaining financing for the partnership property, and reimbursement for incurred expenses. *Id.*

[65] *Id.* at 170-71. GHL distributed offering circulars to prospective limited partners in Somis and Mai-Kai under a permit from the California Corporations Commissioner pursuant to the California Corporate Securities Law. *See* CAL. CORP. CODE §§ 25000-25804 (West 1977).

[66] 66 T.C. at 163, 168. Under the partnership agreements, Mai-Kai and Somis had a stated life of 33 and 15 years, respectively. These periods could be extended by a vote of 60% of the limited partnership interests in Mai-Kai, and by 51% in the case of Somis. The partnerships, however, would be terminated by the following conditions: (1) disposition by the partnership of its entire interest in the property, (2) an adjudication that GHL was bankrupt unless the business was continued by a general partner elected in place of GHL, (3) an affirmative vote of 60%, 51% for Somis, of the limited partners, or (4) the removal of the general partner without a unanimous, majority in the case of Somis, vote by all the limited partners to form a new partnership for the continuation of the partnership business. *Id.*

[67] *Id.* The limited partners could not assign their income rights without the consent of GHL, though GHL could not unreasonably withhold consent. Also, no limited partner could withdraw his capital contribution to the partnership without the consent of GHL, and the capital interests of the limited partners could not be transferred without prior notification to GHL. If the purchase price offered by the proposed transferee was less than the fair market value of the interest, a transfer could not take place unless the selling partner first offered the interest to the remaining limited partners. *Id.* at 165.

[68] *Id.* at 165, 168. Under the partnership agreements, removal of the general partner required unanimous approval in Mai-Kai and a simple majority in Somis. *Id.*

[69] Mai-Kai, for the taxable years 1968 through 1973, reported losses totalling $185,183. Somis, for the same period, reported losses totalling $1,651,849. *Id.*

[70] *Id. See generally* Treas. Reg. § 301.7701-2 (1961).

[71] 66 T.C. at 172.

[72] 65 TAX. CT. REP. (CCH) No. 10 (Oct. 21, 1975).

A. *Interpretation of the Regulations by the Courts*

In both *Zuckman* and *Larson,* the courts applied the corporate characteristics tests of the Kintner regulations[76] in determining the proper classification of the limited partnerships involved. Since the regulations state that an organization will be taxed as a corporation only if it possesses more corporate than noncorporate characteristics,[77] the limited partnerships needed only to avoid two of the four corporate characteristics to achieve their goal of partnership classification. The courts examined each characteristic separately and ruled that each should be accorded equal weight in the final balancing. The court justified the use of this mechanical approach as a means of clarifying a gray area otherwise "frought with imponderables."[78]

1. Continuity of Life

The regulations[79] state that if the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member will cause a dissolution[80] of the organization under local law, then the corporate characteristic of continuity of life does not exist.[81] The regulations further declare that "a limited partnership subject to a statute corresponding to the Uniform Limited Partnership Act . . . lacks continuity of life."[82]

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[73] On November 5, 1975, the petitioners-taxpayers filed a motion for reconsideration which was referred to the trial judge. The trial judge subsequently approved the motion and withdrew the court's initial opinion. 66 T.C. at 160.

[74] *Id.* at 159.

[75] *Id.* at 185 (splitting the court seven to six with two abstentions); *see* Treas. Reg. § 301.7701-2(a)(3) (1961) (stating two to two split requires partnership designation).

[76] In neither case was the validity of the regulations at issue since the taxpayers actually sought the protection of the regulations. The courts rejected any attempt by the IRS to challenge the validity of its own regulations. This point is illustrated by the following statement from the *Zuckman* court:

> It is well settled, however, that "Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes."
>
> In a recent case, moreover, we expressly held that the instant regulations "are reasonable and conform to the revenue statutes, and are, therefore, valid." Under these circumstances, the regulations must be considered as binding on the Government as they are on the taxpayer.

524 F.2d at 739 (citations omitted).

[77] Treas. Reg. § 301.7701-2(a)(3) (1961).

[78] 66 T.C. at 172.

[79] Treas. Reg. § 301.7701-2(b) (1961).

In *Zuckman*, the limited partnership was subject to such a statute in Missouri,[83] and the court, in following the dictate of the regulations, held that the corporate characteristic of continuity of life did not exist.[84] Furthermore, the court concluded that even if that sentence of the regulations had been omitted, the same result would follow under the remainder of the regulation.[85]

In *Larson*, the court held that the limited partnerships subject to California's modified ULPA also did not satisfy the corporate test of continuity of life. The basis for this conclusion was founded in the regulations' test of continuity, which requires that the bankruptcy of any member not cause a dissolution of the organization.[86] The court reasoned that if GHL, as general partner, became bankrupt, dissolution would occur by operation of law; therefore, the court concluded, the corporate characteristic was lacking. Furthermore, according to the court, the presence of a partnership agreement providing for the selection of a new general partner did not alter this conclusion.[87] The impact of this decision was devastating to the IRS, because now, due to the mere potential for bankruptcy,[88] it is highly unlikely that any limited partnership will satisfy the continuity of life aspect of the regulations as they currently exist.[89]

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[80] The regulations define dissolution of an organization as "an alteration of the identity of an organization by reason of a change in the relationship between its members as determined under local law." *Id.* § 301.7701-2(b)(2).

[81] *Id.* § 301.7701-2(b)(1).

[82] *Id.* § 301.7701-2(b)(3).

[83] Mo. Rev. Stat. §§ 359.010-.290 (1969). See notes 9 through 14 and accompanying text *supra*.

[84] 524 F.2d at 734.

[85] *Id.* at 737. The court noted that under the ULPA, if the corporate general partner became bankrupt, the partnership would be dissolved as a matter of law. The mere reservation in the limited partnership agreement of a power to continue the business on the general partner's withdrawal constituted only a "contingent continuity of existence," and was insufficient to satisfy the corporate characteristic. *Id.* at 735 (citing Glensder Textile Co. v. Commissioner, 46 B.T.A. 176, 185-86 (1942), *adopted by* Treas. Reg. § 301.7701-2(b)(1) (1961)).

Additionally, the court noted that under the FHA insured mortgage agreement, the limited partnership did not have the right to dissolve voluntarily. This was not, however, a complete surrender of the power to dissolve, since the corporate general partner had the power under Missouri law to dissolve the partnership irrespective of the consequences. Therefore, Towne House lacked the corporate characteristic of continuity of life. 524 F.2d at 737.

[86] Treas. Reg. § 301.7701-2(b)(1) (1961).

[87] 66 T.C. at 175. The court stated that in the situation of a bankrupt corporate general partner, "there would at best be a hiatus between the event of bankruptcy and the entry of a new general partner." *Id.*

2. Centralization of Management

The regulations[90] define centralized management as a "concentration of continuing exclusive authority to make independent business decisions on behalf of the organization which do not require ratification by members of such organization."[91] The regulations go on to explain that "limited partnerships subject to a statute corresponding to the ULPA, generally do not have centralized management,[92] but centralized management ordinarily does exist . . . if substantially all the interests[93] are owned by the limited partners."[94] The courts have consistently determined that even when a general partner provides centralized administration for a limited partnership, that aspect of the corporate resemblance test will not be satisfied if the general partner has a meaningful proprietary interest.[95]

The *Zuckman* court held that the limited partnership did not have the corporate characteristic of centralized management since the general partner held a sixty-one percent interest in the enterprise.[96] The *Larson* court, however, recognized that the general partner had no substantial proprietary interests,[97] and held that the limited partnerships did possess the corporate characteristic of centralized management.[98]

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[88] Bankruptcy causes the technical dissolution of the organization, and since the regulations speak in terms of "dissolution," rather than "termination of business," they must govern the situation when bankruptcy occurs. *Id.*

[89] *Id.* at 175-76. The court noted, however, the ability of the IRS to change the effects of this decision by revising the language of the regulations. *Id.*

[90] Treas. Reg. § 301.7701-2(c) (1961).

[91] *Id.* § 301.7701-2(c)(3).

[92] The power to manage the business of a limited partnership is vested solely in its general partners. *E.g.*, MISS. CODE ANN. §§ 79-13-19, -21 (1972). A limited partner cannot take part in the control of the business without becoming liable for partnership debts to the same extent as a general partner. *E.g.*, *id.* § 79-13-15. In Delaney v. Fidelity Lease Ltd., 526 S.W.2d 543 (Tex. 1975), the Texas Supreme Court held that limited partners who control the affairs of a limited partnership by serving as officers or directors of a corporation which is sole general partner lose the shield of limited liability. *Id.* at 545-46. For a detailed discussion of *Delaney*, see Hamilton, *Corporations: Annual Survey of Texas Law*, 30 SW. L.J. 153, 153-58 (1976).

[93] Although the phrase "substantially all" is not explained by the regulations, the examples given for Treas. Reg. § 301.7701-2(b)(2) (1961), indicate that 94% of the interests would qualify as "substantially all." A rule of thumb is 90%, Rev. Proc. 66-34, 1966-2 C.B. 1232, and the Service will apparently allow as much as 80% ownership to constitute "substantially all," Sperling & Lokken, *supra* note 46, at 15; *Points to Remember*, 24 TAX. LAW. 605, 606 (1971). In *Zuckman*, the Court of Claims held that limited partnership ownership of 61% of all interests did not create centralization of management. 524 F.2d at 739.

[94] Treas. Reg. § 301.7701-2(c)(4) (1961).

[95] 524 F.2d at 737-39; 66 T.C. at 177; *see* Glensder Textile Co. v. Commissioner, 46 B.T.A. 176, 185 (1942) (managing partners not analogous to directors of a corporation).

3. Limited Liability

Under the regulations,[99] the corporate characteristic of limited liability exists if no member of an organization is personally exposed to the organization's liabilities under "local law."[100] For limited partnerships created under the ULPA, the general partner will be deemed to have the characteristic of personal liability, except "when he has no substantial assets (other than his interest in the partnership) which could be reached by a creditor of the organization, and when he is merely a 'dummy' acting as the agent of the limited partners."[101] Both the *Zuckman* and *Larson* courts held the test to be conjunctive, in that a limited partnership may avoid the corporate characteristic of limited liability if the general partner has either substantial assets, other than his interest in the partnership, or is not a "dummy" for the limited partners.[102]

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[96] 524 F.2d at 739. The IRS asserted that since Forest Park, the general partner, was indirectly wholly-owned by one of the limited partners, J. H. Kantner, the Forest Park interest should be attributed to Kantner. If this were the case, the limited partners would be considered to own substantially all the interests in the limited partnership. The court rejected this argument, stating that there was no authority for applying a constructive ownership rule. Furthermore, even if it were applied, Kantner would be attributed with an 83% interest in Towne House, which "would in itself effectively rule out any possibility of representative management." *Id.*

[97] 66 T.C. at 177-78. GHL, the general partner, contributed no capital to the limited partnership. GHL only had a right to profits and cash flow, which was subordinated to the rights of the limited partners. For the years in question, GHL had not realized any of these benefits. Since the limited partners possessed the right to remove GHL as general partner, "GHL's right to participate in future growth and profits was wholly contingent on satisfactory performance of its management role." *Id.* at 178.

[98] *Id.* at 179.

[99] Treas. Reg. § 301.7701-2(d) (1961).

[100] *Id.* § 301.7701-2(d)(1). "Personal liability means that a creditor of an organization may seek personal satisfaction from a member of the organization to the extent that the assets of such organization are insufficient to satisfy the creditor's claim." *Id.*

[101] *Id.* § 301.7701-2(d). The regulations identify the following as instances when personal liability is deemed to exist:

> [W]hen the limited partners act as the principals of such general partner, personal liability will exist with respect to such limited partners. Also, if a corporation is a general partner, personal liability exists with respect to such general partner when the corporation has substantial assets (other than its interest in the partnership) which could be reached by a creditor of the limited partnership . . . . Furthermore, if the organization is engaged in financial transactions which involve large sums of money, and if the general partners have substantial assets (other than their interests in the partnership), there exists personal liability although the assets of such general partners would be insufficient to satisfy any substantial portion of the obligations of the organization.

Id.

In *Larson,* the Tax Court found it unnecessary to determine whether GHL had substantial assets,[103] because the facts clearly revealed that GHL was not a "dummy" for the limited partners of Somis and Mai-Kai.[104] Consequently, the corporate characteristic of limited liability was nonexistent.

In *Zuckman,* the Court of Claims found that the general partner, Forest Park, had no substantial assets, thus the only unresolved question was the existence of "dummy" status.[105] The court, however, determined that this issue was moot since an examination of the regulations exposed a circular reasoning, which resulted in a finding that no limited partnership could possess limited liability.[106] In reaching this conclusion, the *Zuckman* court recognized that the general partner is not personally liable when it is a "dummy" merely acting as an agent for the limited partners, but reasoned that under those circumstances the limited partners become principals of the general partner, and as such are personally liable.[107] It follows from this reasoning that since personal liability is considered to exist if any member of the organization is exposed to risks in excess of invested capital, no limited partnership can possess the corporate characteristic of limited liability.[108]

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[102] 524 F.2d at 741; 66 T.C. at 179-82.

[103] 66 T.C. at 181.

[104] *Id.* at 181-82. GHL was clearly not a dummy, since it was the moving force behind the entire enterprise, and the persons controlling GHL were independent of and unrelated to the general partners. *Id.*

[105] 524 F.2d at 741.

[106] *Id.* In discussing the circularity, the court explained:

> Where the general partner of a limited partnership has no assets, only two alternatives may follow: (1) if it is not a "dummy," then it is personally liable; or (2) if it is a "dummy," then the limited partners for whom it acts as agent and who in turn serve as its principal, are personally liable. In either case, the limited partnership cannot have limited liability, inasmuch as at least one of its "members"—whether general or limited—must at all times bear personal liability.

Id. (footnotes omitted).

[107] *See* Treas. Reg. § 301.7701-2(d)(2) (1961).

[108] 524 F.2d at 741. The ruling in *Zuckman* renders the test for limited liability "meaningless." Fisher, *supra* note 25, at 642. Although the Tax Court did not expressly approve the reasoning in *Zuckman,* its conclusion in *Larson* that the asset and dummy tests were mutually exclusive would permit future adoption of the "more direct logic" of the *Zuckman* opinion. *Id.*

4. Free Transferability of Interests

The regulations[109] state that an organization has the corporate characteristic of free transferability of interests when

> [e]ach of its members or those members owning substantially all of the interests in the organization have the power, without the consent of other members, to substitute for themselves in the same organization a person who is not a member of the organization . . . [and] to confer upon [their] . . . substitute all the attributes of [their] . . . interest in the organization.[110]

Therefore, free transferability of interests does not exist where each member can, without the consent of other members, transfer his interest in profits, but not his right to participate in the management of the organization.[111] Nor does it exist where, although the agreement provides for the transfer of a member's interest, a transfer of a member's interest will result in the dissolution of the organization under local law.[112]

In *Zuckman,* the Court of Claims, without adopting any affirmative quantitative tests,[113] held that the sixty-one percent interest of the general partner, Forest Park, did not constitute "substantially all" the interests. Furthermore, for the limited partnership to have the corporate characteristic of free transferability of interests, both the interests of Forest Park and the limited partner who controlled and indirectly owned Forest Park must have been freely transferable.[114] While the limited partner's interest was held to be freely transferable, the court determined that Forest Park's was not. The court looked to the Missouri counterpart to section 9 of the ULPA and the partnership certificate, and held that since a substitution of a new general partner in the place of Forest Park would require the consent of all the limited partners or result in a technical dissolution of the partnership, Forest Park's interest was not freely transferable under the regulations.[115]

In *Larson,* the limited partners held substantially all the interests in the partnerships.[116] The limited partners' interests were transferable with two minimal restrictions; income interests could be assigned with the consent of the general partner, which could not be unreasonably withheld, and capital interests could be assigned freely, unless the transfer was to be for less than fair market value, in which event it must first have been offered to the other members.[117] Neither of these restrictions was substantive, and the interests were actually transferable without the discretionary consent of any other member. The limited partnerships in *Larson* were therefore determined to possess the corporate characteristic of free transferability of interests.[118]

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[109] Treas. Reg. § 301.7701-2(e) (1961).

[110] *Id.* § 301.7701-2(e)(1).

[111] *Id.*

[112] *Id.; see id.* § 301.7701-3(b)(2) (limited partner who may transfer his entire interest only with unanimous consent of general partners will not have a freely transferable interest).

[113] 524 F.2d at 742 n.14 (discussing what constitutes "substantially all"). See note 93 *supra.*

[114] 524 F.2d at 742.

[115] *Id.* at 742-44.

[116] 66 T.C. at 182-83. See notes 93 through 98 and accompanying text *supra.*

5. Other Characteristics

The regulations provide that in addition to the four major corporate characteristics discussed above, "other factors may be found in some cases which may be significant in classifying an organization as an association, a partnership, or a trust."[119] The regulations give no further information in regard to what these other factors might be. A look at recent case law will reveal a prevalent attitude of disregard by the courts for this additional consideration.

The *Zuckman* court found it unnecessary to consider any additional factors, since the court had already determined that Towne House lacked all four major corporate characteristics.[120] Conversely, the *Larson* court found the limited partnerships to lack only two of the four major corporate characteristics. Thus, at least the potential for consideration of the "other factors" existed in this borderline classification. Nevertheless, the *Larson* court dismissed these other factors as being not critically significant or properly subsumed in the consideration of the major characteristics.[121] Instead, the Tax Court favored the importance of predictability in applying the regulations and declined to give these lesser characteristics controlling weight "unless their materiality was unmistakable."[122] According to the court, such a situation did not exist in *Larson.*[123]

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[117] 66 T.C. at 182-83.

[118] *Id.* at 183-84. The court noted, "There was no 'effort on the part of the parties to select their business associates' as is characteristic of the usual partnership arrangement." *Id.* at 183 (citing J.A. Riggs Tractor Co. v. Commissioner, 6 T.C. 889, 898 (1946)).

[119] Treas. Reg. § 301.7701-2(a)(1) (1961).

[120] 524 F.2d at 744. The IRS sought consideration of two additional corporate characteristics: "(1) [that the general partner] had unilateral power to admit additional limited partners, and (2) [that the general partner] had exclusive discretion to determine when and if any of the partnership's available funds should be distributed to itself and the limited partners." *Id.*

[121] 66 T.C. at 184. Both sides identified other characteristics which they felt relevant to the classification issue. The taxpayers asserted that "GHL, as manager, lacked the discretionary right to retain or distribute profits." *Id.* The court dismissed this as "directed to the issue of centralized management." *Id.* The court felt that the IRS's analogy between the limited partners' voting rights and those of corporate shareholders was covered in the transferability issue. *Id.* The Tax Court noted several other arguments, but did not consider them of critical significance under the circumstances. Among these were that "interests were divided into units or shares and promoted and marketed [as] securities," that the partnerships did not observe "corporate formalities," and that

B. *Implications of Zuckman and Larson*[124]

The interpretation and application of the regulations by the *Zuckman* and *Larson* courts clearly reveal a present judicial bias toward finding partnership tax status for the limited partnership. It is apparent from a consolidation of those opinions that two corporate characteristics, limited liability and continuity of life, will almost never be attributed to an organization subject to a ULPA statute.

Under the courts' reasoning, continuity of life will invariably be lacking because of the technical dissolution standard adopted by the regulations. The standard precludes this characteristic because of the contingency of bankruptcy of the corporate sole general partner.[125]

For a limited partnership to avoid the corporate characteristic of limited liability, the corporate general partner must either have substantial assets, other than its interest in the limited partnership, or be more than a mere "dummy" acting as the agent for the limited partners. It should be noted, however, that according to the direct statement of the court in *Zuckman,* and as implied by the court in *Larson,* the corporate characteristic of limited liability will not exist when the limited partnership is subject to a ULPA statute, since under those circumstances some member will always be considered personally liable.[126] Because the regulations will not convey corporate status unless an organization has more corporate characteristics than not, any limited partnership subject to the ULPA is effectively guaranteed partnership classification.[127]

"unlike general partners, limited partners were not required to sign the partnership certificates." *Id.* The court also dismissed as subsumed in the major characteristics, the argument that "limited partnerships resemble corporations because they provide a means of pooling investments while limiting liability." *Id.*

[122] *Id.* at 185 n.22.

[123] *Id.*

[124] For further analyses of the courts' interpretations of the classification regulations, see Fisher, *supra* note 25; Mendenhall & Ferguson, *supra* note 25; Sperling & Lokken, *supra* note 46.

[125] See notes 79 through 88 and accompanying text *supra.*

[126] See notes 99 through 108 and accompanying text *supra.*

[127] *E.g.,* Fisher, *supra* note 25, at 641; Sperling & Lokken, *supra* note 46, at 72; Yurow & Parker, *Deductibility of Partnership Losses: Recent Developments Affecting Classification as a Partnership, Special and Retroactive Allocations and Determinations of Partner's Basis,* 35 N.Y.U. INST. FED. TAX. 197, 217-18 (1977).

The courts have set forth rules, although of somewhat diminished significance, for determining when the remaining corporate characteristics are present. Centralized management will be attributed to a limited partnership unless the general partner holds a meaningful proprietary interest.[128] Thus, this corporate characteristic may be avoided if the limited partners do not possess substantially all the interests in the limited partnership. The test of free transferability of interests was determined to be basically a neutral inquiry to be made by the courts based on the facts and circumstances of each case.[129] To avoid this characteristic, the transfer of a meaningful partnership interest should be limited by certain substantive restrictions, such as approval of the transfer by the other members. Significantly, the courts have seemingly limited their investigation to the above four characteristics, since the importance of "other factors" was greatly diminished by the insensitivity of both courts toward this additionally available test.[130]

These precedents severely blunted the IRS attack through the courts on the limited partnership tax vehicle. As suggested by the *Larson* court, however, these findings do not preclude the IRS from appropriately amending the Kintner regulations in an attempt to reassert its assault on the limited partnership tax shelter.[131]

V. PROPOSED AMENDMENTS TO THE REGULATIONS

On January 5, 1977, it appeared that the IRS had accomplished precisely what the *Larson* court had suggested, when they published a set of proposed amendments[132] to the Kintner regulations. These amendments significantly altered the Kintner regulations' classification of corporations, partnerships, and trusts, but the proposals were completely withdrawn two days later for further "consideration."[133] An examination of the proposed regulatory amendments will nevertheless illustrate the attitude and desires of the IRS to execute major revisions and may provide some insight into the possible content of later revision attempts.

The proposed regulations made significant changes with respect to all four major corporate characteristics, but with special emphasis directed toward the characteristics of continuity of life and limited liability. Most importantly, the proposed regulations reject the preponderance test, stating that "[b]ecause the overall resemblance of an organization to a corporation is determinative for purposes of classification, an organization may be classified as an association when it resembles a corporation with respect to two or more of the four characteristics."[134]

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[128] See notes 90 through 98 and accompanying text *supra*.

[129] See notes 109 through 118 and accompanying text *supra*.

[130] See notes 119 through 123 and accompanying text *supra*.

[131] The Tax Court stated in *Larson* that if the regulations permitted an overall corporate resemblance test as espoused by *Morrissey*, such would permit the weighing of each factor according to the degree of corporate similarity it provides. Accordingly, the court would have been inclined to hold Mai-Kai and Somis taxable as corporations. The court observed, "Were not the regulations' thumb upon the scales, it appears to us that the practical continuity and limited liability of both entities would decisively tip the balance in [the Government's] favor." 66 T.C. at 185-86.

[132] 42 Fed. Reg. 1038-44 (1977).

[133] *Id.* at 1489.

One of the most prominent changes under the proposed regulations was the adoption of new criteria for determining the existence of continuity of life within an organization. The proposals abandoned the technical dissolution-under-local-law standard and adopted as a test the practical assessment of whether the business operations of the organization would continue after dissolution.[135] As a result of this change, continuity of life would exist as long as a majority interest had "the power to prevent interruption of the business operations of the organization despite a dissolution of the original entity under local law as a result of a change in the status or identity of one or more members."[136] Continuity of life will continue to exist upon dissolution, as long as the withdrawal of capital by some of the members "would not significantly impair the continuation of the business."[137] The actual withdrawal of capital is immaterial and the determination of "significantly impair" will be a facts and circumstances test.[138] However, the validity of the continuity of life aspect of the proposed regulations under the ULPA and prior decisions has been questioned.[139]

The proposed regulations stated that the corporate characteristic of centralized management would exist when the members responsible for the management of an organization act primarily in a representative capacity.[140] Members responsible for management act in a representative capacity when, as a class, they either do not own a substantial interest in the organization,[141] or are subject to removal by a vote of the nonmanaging members.[142] Thus, the proposed regulations retained the present substantial interest standard[143] and added as a new indicator of centralized management, the power to remove the general partner.[144]

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[134] *Id.* at 1040.

[135] *Id.* at 1041.

[136] *Id.*

[137] *Id.*

[138] *Id.* at 1042-43 (withdrawal of 40% interest would impair an ordinary business, but not a mutual fund).

[139] Fisher, *supra* note 25, at 647-53.

[140] 42 Fed. Reg. 1041 (1977).

[141] *Id.* at 1042-43 (40% interest is substantial, 20% is not).

[142] *Id.* at 1041.

[143] See notes 93 through 98 and accompanying text *supra*.

[144] 42 Fed. Reg. 1041 (1977).

This proposed regulation reflects the IRS's strong stance in favor of association classification, since all corporations and a substantial number of general partnerships can be characterized by a similar degree of centralized management.[145]

As to limited liability, the proposed regulations substantially departed from the present regulations, which look to determine if any member is personally liable.[146] Under the proposed regulations, limited liability would have existed where the percentage of interests that did not entail personal liability was "substantially in excess" of the percentage of interests that did entail personal liability.[147] The new proposals also provided that in the absence of potential liability in fact, the characteristic of limited liability would not be considered in determining overall corporate resemblance.[148] Obviously, this standard would have created a far more formidable obstacle for an organization attempting to avoid corporate classification.[149]

In regard to the corporate characteristic of free transferability of interests, the principal change instituted by the proposed regulations was that "[a]n interest is considered transferable despite the inability of the holder to substitute another person as a member of the organization if the primary attributes of the interest, such as the rights to share in the profits and to a return of a contribution of capital, are assignable rights."[150] The approach of the proposed regulations in regard to this characteristic was consistent with the position taken by the *Zuckman* and *Larson* courts, in seeking to determine whether an interest was transferable as a practical matter.[151]

One writer noted that the proposed regulations were "doomed from the beginning," since they applied the new classification rules to all organizations, and thus "directly affected the continued viability of low-income housing projects administered by the Department of Housing and Urban Development, which are financed largely by substantial private investments in limited partnerships."[152] It has been asserted that since Congress can remedy the abusive use of tax loopholes, as was done in some areas by the Tax Reform Act of 1976, sound federal tax policy dictates that taxpayers be allowed to choose the form of business they desire with reasonable predictability. Once the selection is made, the taxpayer can take the acknowledged benefits and consequences bestowed on that format by the Congress.[153]

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[145] Fisher, *supra* note 25, at 655.

[146] See notes 99 through 108 and accompanying text *supra.*

[147] 42 Fed. Reg. 1042 (1977).

[148] *Id.*

[149] *See* Fisher, *supra* note 25, at 656-57 (the bias toward corporate treatment is justified under *Morrissey).*

[150] 42 Fed. Reg. 1042 (1977).

[151] Fisher, *supra* note 25, at 658.

[152] *Id.* at 663; *see* Oser, *Battle is Joined on I.R.S. Partnership—Corporation Ruling,* N.Y. Times, Jan. 7, 1977, § A, at 11, col. 3 (withdrawal due to reaction by public housing industries); Wash. Post, Jan. 6, 1977, § A, at 1, col. 3 (Secretary of Treasury explains proposed regulations issued without his knowledge).

VI. TAX REFORM ACT OF 1976

While the IRS has attempted to eliminate the limited partnership tax shelter by attacking its partnership classification, Congress has also acted to restrict the use of tax shelters. However, instead of attacking the classification of the organization through which the tax benefits flow, Congress has amended the substantive law to limit the tax shelter benefits regardless of the type of organization selected by the taxpayer. This approach by Congress has insured predictability while effectively remedying specific areas where the use of tax shelters was considered abusive.[154]

The greatest thrust of congressional action appeared in the Tax Reform Act of 1976,[155] in which Congress curtailed many of the benefits available through partnership tax shelter arrangements.[156] Certain changes directly curtailed the partnership vehicle, while others limited tax shelter benefits generally.[157] Certain provisions of the Act dealt specifically with the partnership as a tax shelter vehicle and made significant changes in the areas of a partner's basis, special and retroactive allocations to partners, partnership syndication fees, additional first-year depreciation, and swap funds.[158]

Under prior law, a limited partner could invest in a tax shelter at year's end and receive a full year's allocation of partnership losses.[159] The 1976 Act changed this procedure by providing that partnership income and losses will be allocated to a partner only for that portion of the year during which he is a member of the partnership.[160] Special allocations of partnership items to fit specific partner needs have also been restricted. The Act provides that the allocation of such items as income and losses shall be determined according to the partner's interest in the partnership, so long as the partnership agreement is silent concerning allocations, or provided the allocation in the partnership agreement lacks substantial economic effect.[161] Furthermore, the Act applies the additional first-year depreciation allowance limitations at both the partnership and partner level, thereby restricting each partnership to one $2,000 limit.[162] Additionally, the Act denies the deduction of partnership organizational expenses and syndication fees,[163] but organizational expenses may nevertheless be amortized over sixty months by election.[164] The Act also limits the formation of partnership swap funds to diversify investments without recognition of gain on appreciation. Consequently, gain will now be recognized if the partnership to which the property is transferred is an investment company.[165]

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[153] Hyman & Hoffman, *Partnerships and "Associations": A Policy Critique of the Morrissey Regulations,* 3 J. REAL ESTATE TAX. 377, 377 (1976).

[154] *Id.* at 382-83.

[155] Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified in scattered sections of I.R.C. (1954)).

[156] Sexton & Charyk, *Partnerships as Vehicles for Tax Shelter Arrangements Severely Curtailed by TRA,* 45 J. TAX. 338, 338 (1976).

[157] *See generally* PRENTICE HALL, INC., CONCISE EXPLANATION OF THE TAX REFORM ACT OF 1976, ¶¶ 118-143, at 25-35 (1976).

[158] Tax Reform Act of 1976, § 213, Pub. L. No. 94-455, 90 Stat. 1520 (amending respectively I.R.C. §§ 704(d) (partner's basis), 704(b), 706(c)(2)(B) (allocations), 709 (syndication fees), 179(d)(8) (depreciation)). *See generally* PRENTICE HALL, INC., *supra* note 157, ¶¶ 131-34, at 31-35.

[159] Sexton & Charyk, *supra* note 156, at 339 (construing I.R.C. §§ 704(a), 761(c)).

[160] I.R.C. §§ 704(a), 706(c)(2)(B).

The most far reaching changes made by the Act relate to the general and specific partnership "at risk" rule.[166] This rule limits a partner's adjusted tax basis, with respect to allocations of partnership losses, to his actual investment plus the value of any loans to the extent of his personal liability thereon.[167] The "at risk" rule encompasses all partnerships, whether general or limited, subject to two classes of exceptions.[168] One exception sets forth four specific areas which would be subject to their own special "at risk" provisions.[169] However, the most important exception relates to real property other than mineral leases. Under this exception, the "at risk" limitations do not apply to any partnership which invests in real property as its principal activity.[170] Thus, with the exception of real property investments, investors may deduct losses only up to the amount they may ultimately be required to contribute.[171]

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[161] *Id.* § 704(b).

[162] *Id.* § 179(d)(8).

[163] *Id.* § 709(a).

[164] *Id.* § 709(b) (omitting promotion fees from amortization).

[165] *Id.* § 721(b) (partnership need only "be treated as investment company" under § 351).

[166] *See id.* § 704(d). The 1976 Act added two sentences to this section:

> For purposes of this subsection, the adjusted basis of any partner's interest in the partnership shall not include any portion of any partnership liability with respect to which the partner has no personal liability. The preceding sentence shall not apply with respect to any activity to the extent that section 465 (relating to limiting deductions to amounts at risk in case of certain activities) applies, nor shall it apply to any partnership the principal activity of which is investing in real property (other than mineral property).

Id.

[167] *Id.*

[168] *Id.*

[169] *Id.* § 465 (limiting losses to investments plus liability for loans in fields of (1) film production, (2) some farming, (3) leasing personalty subject to depreciation recapture, and (4) oil and gas properties).

Although specifically omitted from the "at risk" limitations, depreciable real property was affected by several sections of the Act. As to this area, the Act limited the deduction of construction period interest and taxes[172] by providing for the recapture of post-1975 excess depreciation on real property.[173] However, the Act maintained and actually increased special depreciation deductions for rehabilitating low-income housing.[174] Farming enterprises organized as farming syndicates,[175] corporations, and partnerships with a corporate partner[176] were also affected strongly by the Act. In addition to the above changes, the Act also limited the deductibility of certain interest deductions.[177]

VII. CONCLUSIONS

In taking a broad overview of the present existence and problems confronting the limited partnership tax shelter, it is apparent that the limited partnership with a corporation as sole general partner continues as a viable tax shelter vehicle. Indeed, the present regulations, as interpreted by the *Zuckman* and *Larson* courts, virtually guarantee that any limited partnership with a corporation as sole general partner subject to the ULPA will be classified as a partnership for tax purposes.[178] Additionally, those which are not subject to the ULPA can ensure partnership status by avoiding at least two of the four corporate characteristics set forth by the regulations as interpreted by the courts.[179] Furthermore, the onerous standards required to obtain an advance ruling on partnership status serve merely to create prohibitive restrictions to any preliminary guarantee by the IRS that partnership status will be recognized. These advance ruling requirements, however, carry no weight in the ultimate partnership versus corporate determination.[180]

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[170] *Id.* § 704(d).

[171] Leifer, *1976 Tax Reform Act Effect on Partnership Tax Shelters,* 35 N.Y.U. INST. FED. TAX. TRA-51 to -57 (1977); Sexton & Charyk, *supra* note 146, at 342. Leifer suggests electing out of partnership status to avoid the "at risk" rule, Leifer, *supra,* at TRA -55 to -57, but an expansive interpretation of "investing in real property" may offer the more acceptable solution, Yurow & Parker, *supra* note 115, at 230.

[172] I.R.C. § 189 (allowing deduction of one-half during construction period, balance over three years).

[173] *Id.* § 167(k).

[174] *Id.*

[175] *Id.* §§ 278(b), 464. Farming syndicates are now limited, for example, to deductions for only those feeds and fertilizers actually used. *Id.* § 464(a). A farming syndicate means a partnership or any enterprise, other than a corporation, engaged in farming and having its securities listed with any federal or state agency. The term also includes an unlisted enterprise allocating more than 35% of its losses to limited partners or limited entrepreneurs. *Id.* § 464(a)(1)(A), (B).

[176] *Id.* § 447. A corporation, or a partnership with a corporate partner, engaged in farming, must use the accrual method of accounting and capitalize its preproductive period expenses. *Id.* § 447(a). However, the provision excepts subchapter S corporations, family corporations and corporations with gross receipts of $1,000,000 or less. *Id.* § 447(c)(1).

[177] *Id.* §§ 163(d), 461(g).

[178] See note 124 *supra.*

As the situation presently stands, the IRS is bound by the current regulations and the court's interpretation of them. This position was recently solidified when the IRS elected to withdraw its Ninth Circuit appeal of the *Larson* decision. Since no appeal is pending, it becomes clear for the present that both the Tax Court and the Court of Claims offer favorable forums to the limited partnership with a corporation as sole general partner, especially those subject to the ULPA.[181] Thus, it would appear that the remaining alternative available to the IRS would be that of effectively amending the current regulations. The present regulations have been in force for eighteen years, and the recent initial attempt by the IRS to amend them proved to be unsuccessful since the proposals were immediately withdrawn. In light of these facts, the question of whether the regulations will eventually be amended, with or without a grandfather clause,[182] is one of pure speculation. It is the position of this Comment that Congress, in the Tax Reform Act of

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[179] See note 28 and accompanying text *supra.* The prudent tax shelter planner should still avoid as many of the corporate characteristics as is practical under the circumstances. Yurow & Parker, *supra* note 127, at 217-18.

[180] See notes 46 through 49 and accompanying text *supra.*

[181] By withdrawing its appeal to the Ninth Circuit, the IRS has given the taxpayer the benefit of *Larson* as binding stare decisis in the Tax Court. Now a limited partnership with a corporation as sole general partner confronted with a challenge of its partnership status by the IRS can find a favorable forum in the Tax Court as well as the Court of Claims. The taxpayer may thus elect which forum his tax case will be tried in. Prior to this withdrawn appeal, the Court of Claims was the only forum with stable favorable precedent; however, to get into the Court of Claims, the taxpayer must first pay the full deficiency assessed by the IRS and then sue for refund in the Court of Claims. 28 U.S.C. § 1491 (1970). The burden of paying the potentially enormous deficiencies could be extremely prohibitive. The Tax Court, however, allows the taxpayer to challenge the deficiency without first making payment. I.R.C. § 7442. Thus, the IRS's withdrawal of appeal in *Larson* gives the taxpayer a much more accessible forum with a favorable precedent toward finding of partnership status.

[182] Grandfather clauses allow organizations existing as of the date of amendment to continue to exist according to prior law. When the Kintner regulations were adopted in 1960, they allowed nine months for amending organization charters to conform to the new regulations. Treas. Reg. § 301.7701-2(a)(4) (1961). The proposed regulations gave a grace period of three years to amend organization charters to conform to the new regulations. It has been noted that there is meritorious argument that an organization should not be reclassified if formed under a law with an 18 year tenure. Fisher, *supra* note 25, at 663 n.22.

1976,[183] has appropriately taken the more practical approach by identifying and remedying those specific areas where use of tax shelters was considered to be abusive.

At the same time, Congress has recognized that tax shelters should be available to taxpayers in those areas where they are not abused. The more precise congressional solution is far more sensible than the classification approach sought by the IRS. The IRS solution is reached only by the complete elimination of all tax shelters with no consideration of the effect on nonoffending entities. Tax shelter questions are questions of tax policy and should be determined by congressional legislation in order to provide predictability in tax results while allowing businesses the freedom to choose the type of organization they prefer. As a result of this congressional stance coupled with the interpretation of the present regulations by the courts, the limited partnership with a corporation as sole general partner continues to exist as a viable tax shelter vehicle.

Norman Craig Brewer III

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[183] Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (codified in scattered sections of I.R.C. (1954)).

RECENT DECISIONS

Admiralty—Strict Products Liability—Comparative Fault Principles Applicable to Strict Products Liability Actions in Admiralty

Pan-Alaska Fisheries, Inc. brought a negligence and products liability action in admiralty[1] to recover damages caused by a fire aboard its ship.[2] The fire had allegedly resulted from a defective fuel filter in the ship's newly installed engine.[3] The defendants included the manufacturer, the distributor, and the company that installed the engine.[4] The manufacturer had sent letters[5] to the dealers warning them of the defective condition of the filters, but no effort was made to warn any subsequent purchasers of the engine.[6] The United States District Court for the Western District of Washington held that strict products liability was not applicable and that only the dealer was liable to the plaintiff.[7] The district court awarded Pan-Alaska damages equaling only one-half the value of the ship since Pan-Alaska was found to have been contributorily negligent.[8] On appeal, the United States Court of Appeals for the Ninth Circuit remanded the case to the district court for a reconsideration of the damages.[9] The district court found Pan-Alaska contributorily negligent for two-thirds of the damages to the ship and reduced the damages accordingly.[10] On subsequent appeal to the United States Court of Appeals for the Ninth Circuit, *held*, vacated and remanded. The principles of comparative fault apply in apportioning responsibility for damages where the liability of the defendant lies not only in negligence but also in strict products liability in admiralty. *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129 (9th Cir. 1977).

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[1] The admiralty jurisdiction of the federal courts is stated in 28 U.S.C. § 1333 (1970), which provides in relevant portion:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

[2] Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129, 1130-31 (9th Cir. 1977).

[3] *Id.* at 1131.

[4] Caterpillar Tractor Co., the manufacturer, had sold the engine to its franchised dealer, Northern Commercial Marine, who had then sold it to Marine Construction & Design Co., who, in turn, had installed the engine while rebuilding the vessel for Pan-Alaska Fisheries, Inc. *Id.* at 1130-31.

[5] Nine days before the dealer delivered the engine to the installer Marco, Caterpillar had sent a products letter to its dealers instructing them to advise all owners of the type engine equipped with the defective fuel filters to discontinue using the filters, and to replace them with substitute filters. The letter also instructed the dealers to supply owners of the engine with the new filters as soon as possible. *Id.* at 1131.

[6] N.C. Marine was found negligent for failing to change the filters on the engine after it received the products letter from Caterpillar, for failing to advise either Marco or Pan-Alaska to make the change, and for failing to warn them of the potential danger involved with using the defective filters. *Id.* at 1133.

[7] The contributory negligence of Pan-Alaska revolved about two central issues: (1) that the ship's engineer was negligent in failing to observe the engine's operation at full speed after discovering that one of the two fuel filters had ruptured, particularly when he knew the vessel's fuel supply may have been contaminated by dirty fuel tanks, and (2) that Pan-Alaska was negligent in not training the crew in fire-fighting techniques. *Id.*

[8] The rule of equally-divided damages was established in The Schooner Catharine v. Dickinson, 58 U.S. (17 How.) 170 (1885). Where two parties were found to have contributed to the cause of a marine collision, the damages were divided equally between the parties. *Id.* at 177-78.

The development of products liability law in admiralty has paralleled the development of the doctrine of products liability in general tort law.[11] The defense of lack of privity of contract, used at one time to bar actions by users of goods who did not stand in a contractual relation with the supplier,[12] also barred similar suits in admiralty.[13] Lack of privity was subsequently removed as a defense to negligence actions from both general tort law[14] and tort actions in admiralty.[15] The extension of the original seller's negligence liability to include those not in privity with the sellers was followed by an expansion of manufacturers' liability to include claims based on strict liability.[16] The belief that manufacturers should be held strictly liable for harm caused by their defective products found expression in the theory of the "implied warranty of merchantability."[17] The implied warranty doctrine was first used in admiralty as a defense to actions by sales creditors.[18] Subsequently, the implied warranty theory in admiralty was expanded to include strict liability as a basis of recovery. In *Middleton v. United Aircraft Corp.*,[19] the implied warranty of merchantability was used to sustain a strict liability in tort action under the Death on the High Seas Act[20] against the manufacturer of a defective helicopter. The *Middleton* doctrine has also been applied to admiralty tort actions involving property loss.[21] The implied warranty theory was not, however, without difficulties.[22]

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[9] The case was remanded for consideration in light of United States v. Reliable Transfer Co., 421 U.S. 397 (1975), which overruled *The Schooner Catharine*. The Supreme Court adopted, in *Reliable Transfer*, a rule of pure comparative fault for cases involving marine collisions or strandings. *Id.* at 411.

[10] Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 402 F. Supp. 1187 (W.D. Wash. 1975).

[11] "[T]he history recited seems to indicate that admiralty law (albeit slowly) draws upon and incorporates the law prevailing on land when there is no historic (or statutory) principle to the contrary." Schaeffer v. Michigan-Ohio Navigation Co., 416 F.2d 217, 221 (6th Cir. 1969). *See generally* McCune, *Maritime Products Liability*, 18 HASTINGS L.J. 831 (1967).

[12] Lack of privity has been invoked to bar recovery by an innocent plaintiff in a negligence action for personal injury against the owner of a carrier who had supplied the plaintiff's employer with a defective carriage. Winterbottom v. Wright, 152 Eng. Rep. 402, 404 (Ex. 1842). *See also* Burkett v. Studebaker Bros. Mfg. Co., 126 Tenn. 467, 150 S.W. 421, 423 (1912) (action for defect in carriage barred due to lack of privity between plaintiff and defendant); Hasbrouck v. Armour & Co., 139 Wis. 357, 121 N.W. 157, 161 (1909) (no liability for dangerous soap since there was no privity between plaintiff and defendant).

[13] An employee of a stevedore firm, injured when a cargo line parted and a bale of cotton fell on him, was barred from recovering against the shipowner because he was not in privity with the ship's charter party, under whose contract with the shipowner the cargo line had been furnished. The Mary Stewart, 10 F. 137, 137-39 (E.D. Va. 1881); *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 96, at 641 (4th ed. 1971) (defense of lack of privity was firmly established in the nineteenth century). *But see* Couglin v. The Rheola, 19 F. 926, 927 (C.C.N.Y. 1884) (stevedore allowed recovery against shipowner under negligence theory because lack of privity held not to affect shipowner's duty not to be negligent).

[14] *See* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). Justice Cardozo, writing for the court, stated, "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else." *Id.* at 389-90, 111 N.E. at 1053.

[15] *See* Sieracki v. Seas Shipping Co., 149 F.2d 98, 99-100 (3d Cir. 1945) (affirming negligence liability of shipbuilder by holding the *MacPherson* doctrine has been so widely accepted that it should be considered a part of the general law of torts, including maritime

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torts), *aff'd,* 328 U.S. 85 (1946); *cf.* Weinstein v. Eastern Airlines, Inc., 203 F. Supp. 430, 431 (E.D. Pa. 1962) (defendant did not contest the negligence count in a wrongful death action in admiralty which arose from an airplane crash), *aff'd,* 316 F.2d 758 (3d Cir.), *cert. denied,* 375 U.S. 940 (1963).

[16] *See* W. PROSSER, *supra* note 13, § 97, at 650.

[17] The first cases extending the implied warranty concept beyond those in privity with the seller were cases involving bad food, where the negligence of any one party was often difficult to prove. *See* Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633, 634-36 (poisonous substance in meat). To extend liability of the manufacturer to the ultimate consumer, Mississippi originated the idea of an implied warranty running with the goods, analogous to covenants running with the land. *See* Coca-Cola Bottling Works v. Lyons, 145 Miss. 876, 883, 111 So. 305, 307 (1927). The implied warranty cases reached fruition in the case of Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960), where both the manufacturer of an automobile and the dealer who sold it were held liable to the wife of the purchaser, who was driving the car when the steering gear malfunctioned. 161 A.2d at 101.

[18] The implied warranty that goods are reasonably fit for their intended purpose was successfully invoked to bar recovery by the seller of the unpaid price of a defective fishing net. Linen Thread Co. v. Shaw, 9 F.2d 17 (1st Cir. 1925). The court held that, regardless of a statute creating the warranty in Massachusetts where the action was brought, the implied warranty is part of commercial common law. *Id.* at 19.

[19] 204 F. Supp. 856 (S.D.N.Y. 1960). The *Middleton* case is generally regarded as the first case in which a cause of action in admiralty for strict liability against a manufacturer was allowed. *See* McCune, *supra* note 11, at 858-59.

[20] 46 U.S.C. §§ 761-768 (1970).

[21] *See* Ohio Barge Line, Inc. v. Dravo Corp., 326 F. Supp. 863, 865-66 (W.D. Pa. 1971) (holding manufacturer strictly liable for damages caused by a towboat out of control because of a defective clutch system).

[22] *See* Noel v. United Aircraft Corp., 204 F. Supp. 929 (D. Del. 1962), in which the court refused to allow the plaintiff to assert a claim for breach of implied warranty of fitness in a maritime action under the Death on the High Seas Act, and held that to expand the maritime doctrine of unseaworthiness by calling it an implied warranty of fitness would amount to impermissible judicial legislation. *Id.* at 940. The court regarded the implied warranty of fitness and merchantability as a "phenomenon of state sales laws" and, as such, unknown to federal maritime law. *Id.* at 934. The main difficulty with the implied warranty theory noted by the court in *Noel* is that "warranty" is so often associated with the law of sales. For an overall discussion of problems with the implied warranty theory in strict products liability, see Prosser, *The Assault Upon the Citadel,*

Realizing the need for a clarification of the legal basis of strict products liability, the American Law Institute in 1965 adopted section 402A of the *Restatement (Second) of Torts*[23] as the proper enunciation of the doctrine. Section 402A clearly rejects the argument that either privity of contract or warranty is essential to recovery in a strict products liability action[24] and expands the scope of liability beyond manufacturers to include retailers and wholesalers as potential defendants.[25] Section 402A has been adopted by a number of jurisdictions as the law of strict products liability in general tort law,[26] and with the growing acceptance of products liability actions in maritime cases,[27] courts have begun applying section 402A in admiralty cases, holding defendants strictly liable for harm caused by their defective products.[28]

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69 YALE L.J. 1099 (1960), wherein the author declares that strict liability in tort should be declared outright, "without any illusory contract mask." *Id.* at 1134.

[23] RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

[24] *Id.* Comment m provides: "In short, 'warranty' must be given a new and different meaning if it is used in connection with this Section. It is much simpler to regard the liability here stated as merely one of strict liability in tort."

[25] *Id.* Comment f provides: "[The doctrine of strict products liability] applies to any manufacturer of such a product, to any wholesale or retail dealer or distributor . . . . It is not necessary that the seller be engaged solely in the business of selling such products." *See* d'Hedouville v. Pioneer Hotel Co., 552 F.2d 886, 892-93 (9th Cir. 1977) (manufacturer-supplier's duty to warn not limited to immediate purchaser). The goals of strict products liability as espoused in § 402A are to provide plaintiffs with solvent defendants, and to place liability for harm caused by defective products upon those who are both responsible for the product's manufacture, distribution, and sale, and who are best able to absorb the costs of injuries through price adjustments. *See* Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1962); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 84-96 (1960).

[26] For some recent adoptions of § 402A, see Mather v. Caterpillar Tractor Corp., 23 Ariz. App. 409, 533 P.2d 717, 719 (1975); Kirkland v. General Motors Corp., 521 P.2d 1353, 1358 (Okla. 1974); Zaleskie v. Joyce, 133 Vt. 150, 333 A.2d 110, 113 (1975). *See also* Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products,* 20 SYRACUSE L. REV. 559, 572 (1969) (discussion of cases dealing with application of strict liability theory).

[27] *See, e.g.,* Schaeffer v. Michigan-Ohio Navigation Co., 416 F.2d 217, 221 (6th Cir. 1969); Soileau v. Nicklos Drilling Co., 302 F. Supp. 119, 126 (W.D. La. 1969).

[28] *See, e.g.,* Lindsay v. McDonnell-Douglas Aircraft Corp., 460 F.2d 631, 636 (8th Cir. 1972).

While the incorporation through implied warranties[29] and section 402A[30] of strict products liability into admiralty law is a fairly recent development, strict liability has long been applied in admiralty through the doctrine of unseaworthiness.[31] In admiralty actions predicated upon unseaworthiness, the principles of comparative fault are applied in mitigation of damages.[32] A number of jurisdictions have successfully applied comparative fault principles to strict products liability actions in general tort law, rejecting the notion that the two are conceptually incompatible.[33] In *Butaud v. Suburban Marine & Sporting Goods, Inc.*,[34] the court applied a comparative negligence standard to an action in strict products liability, noting that comparative fault principles have long applied to admiralty actions under the doctrine of unseaworthiness.[35] In *Dippel v. Sciano,*[36] the court reached essentially the same result of applying comparative fault to a strict products liability action by holding that a violation of section 402A of the *Restatement* is the conceptual equivalent of a finding of negligence per se, and the comparative negligence statute should therefore apply.[37] Using the court's reasoning in either *Butaud* or *Dippel*, the result is the same: the plaintiff's conduct is used to reduce the damages where he is found to have contributed to the cause of the injury or loss.

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[29] Ohio Barge Line, Inc. v. Dravo Corp., 326 F. Supp. 863 (W.D. Pa. 1971).

[30] *See, e.g.*, Lindsay v. McDonnell-Douglas Aircraft Corp., 460 F.2d 631, 636 (8th Cir. 1972).

[31] Seeking to clarify the concept of unseaworthiness, the Supreme Court has commented:

> It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. It is a form of absolute duty owing to all within the range of its humanitarian policy.

Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94-95 (1946) (citation omitted). Unseaworthiness is a condition, and whether that condition arose from negligence is irrelevant to the owner's liability for personal injuries resulting from the condition. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 498 (1971). Unseaworthiness has had widely varying applications. *See* International Stevedoring Co. v. Haverty, 272 U.S. 50, 52 (1926) (extending unseaworthiness to include stevedore injured while loading a ship); The Caledonia, 157 U.S. 124, 131 (1895) (loss of perishable cargo due to ship's delay); Webb v. Dresser Indus., 536 F.2d 603 (5th Cir. 1976) (failure to provide seaman with proper foot attire), *cert. denied*, 429 U.S. 1121 (1977); The H.A. Scandrett, 87 F.2d 708, 709-10 (2d Cir. 1937) (holding shipowner absolutely liable for harm caused by defects in vessel's hull and equipment). *See generally* Chamlee, *The Absolute Warranty of Seaworthiness*, 24 MERCER L. REV. 519 (1973). *See also* G. GILMORE & C. BLACK, JR., THE LAW OF ADMIRALTY 122 (2d ed. 1975).

[32] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953). A carpenter, employed by an independent contractor, sued the shipowner for negligence and unseaworthiness. The court stated that the common law concept of contributory negligence as a complete bar to recovery is incompatible with modern admiralty policy which is more flexible and allows consideration of contributory negligence in mitigation of damages as justice requires. *Id.* at 408-09. Contributory negligence as a complete defense has been removed from personal injury cases brought by seamen under the Jones Act. 46 U.S.C. § 688 (1970).

[33] *See* Edwards v. Sears, Roebuck, & Co., 512 F.2d 276, 290 (5th Cir. 1976) (plaintiff had been drinking and driving at an excessive speed); Netzel v. State Sand & Gravel Co., 51 Wis. 2d 1, 186 N.W.2d 258, 265 (1971) (plaintiff's allowing concrete to remain on his leg knowing it would cause burns held not to bar recovery but to reduce damages). *See also* Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp. 598, 603 (D. Idaho 1976) ("strict liability, like negligence per se, is equally capable of causal comparison"); Hagenbach v. Snap-on-Tools, Inc., 339 F. Supp. 676, 683 (N.D.H. 1972) (holding the plaintiff contributorily negligent in a strict liability case).

[34] 555 P.2d 42 (Alaska 1976).

Although the application of comparative fault in admiralty was later extended to include actions for wrongful death arising in products liability,[38] courts continued, in cases involving maritime collisions or strandings, to apply the admiralty rule of dividing damages equally where both parties were found to be at fault.[39] The equally-divided damages rule, established in England[40] and later adopted in America in *The Schooner Catharine v. Dickinson,*[41] has been the subject of much controversy and criticism.[42] Aware of the need for modifying this rule,[43] the Supreme Court, in *United States v. Reliable Transfer Co.*,[44] overruled *The Schooner Catharine* and adopted a rule of pure comparative fault for admiralty cases involving collisions or stranding.[45] The Court took note of the fact that England had long ago abolished the rule[46] and that the purpose of the equally-divided damages rule, as initially espoused in *The Schooner Catharine*, had been to achieve an equitable allocation of liability between the parties—a purpose that the rule often frustrated.[47] Federal courts that have had the opportunity have adhered to the rulings in *Reliable Transfer*.[48]

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[35] *Id.* at 46. The court reasoned that "[t]he public policy reasons for strict products liability do not seem to be incompatible with comparative negligence. The manufacturer is still accountable for all the harm from a defective product, except that part caused by the consumer's own conduct." *Id. See generally* Schwartz, *Strict Liability and Comparative Negligence,* 42 TENN. L. REV. 171, 179-80 (1974); Wade, *On the Nature of Strict Tort Liability for Products,* 44 MISS. L.J. 825, 850 (1973).

[36] 37 Wis. 2d 443, 115 N.W.2d 55 (1967).

[37] *Id.* at 64-65. The court's reasoning was an attempt to bypass the semantic difficulty involved in applying a comparative negligence statute to a defendant whose liability is not predicated upon negligence. *Id.*; *cf.* Horn v. General Motors Corp., 17 Cal. 3d 359, 551 P.2d 398, 139 Cal. Rptr. 78 (1976) (Clark, J., dissenting). The dissenting judge argued that since strict products liability is not an absolute doctrine, and since fault is an integral part of strict products liability, the principles of comparative fault should therefore apply to strict products liability actions. *Id.* at 373, 551 P.2d at 406, 139 Cal. Rptr. at 86.

[38] *See* Krause v. Sud-Aviation, Societe Nationale de Constr. Aeronatiques, 301 F. Supp. 513 (S.D.N.Y. 1968), *aff'd,* 413 F.2d 428 (2d Cir. 1969). In *Krause*, the plaintiff's decedent was killed when a defective helicopter crashed into the sea killing all those aboard. In allowing the plaintiff to state a cause of action for breach of implied warranty under the Death on the High Seas Act, 46 U.S.C. §§ 761-768 (1970), the court held that under § 766 of the Act contributory negligence is not a complete defense, but serves only to mitigate damages. 301 F. Supp. at 521.

[39] *See generally* Jackson, *The Archaic Rule of Dividing Damages in Marine Collisions,* 19 ALA. L. REV. 263 (1967)(a discussion of dividing damages); Sprague, *Divided Damages,* 6 N.Y.U.L. REV. 15, 15-23 (1928) (history and development).

[40] *See* The Woodrup-Sims, 165 Eng. Rep. 1422, 1423 (1815).

[41] 58 U.S. (17 How.) 170, 177-78 (1855). *See, e.g.,* The North Star, 106 U.S. (16 Otto) 17, 28-29 (1882); The Sapphire, 85 U.S. (18 Wall.) 51, 56 (1873).

[42] The rule of dividing damages equally between parties found to be at fault was applied without regard to the degree of fault of the respective parties. In Oriental Trading & Transport Co. v. Gulf Oil Corp., 173 F.2d 108 (2d Cir.), *cert. denied,* 337 U.S. 919 (1949), the court reluctantly applied the equally-divided damages rule where the faults of the parties were shown to be highly disproportionate. 173 F.2d at 111. Various rules, however, had developed to help alleviate the sometimes harsh and inequitable results of the equally-divided damages rule. One such rule was the "major-minor fault" rule, used to mitigate the effect of the equally-divided damages doctrine where one party was grossly

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negligent and the other is at fault only in a technical sense. G. Gilmore & C. Black, Jr., *supra* note 31, at 492. In The City of New York, 147 U.S. 72 (1893), the Supreme Court stated the operation of the rule as follows:

> Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.

Id. at 85. The "major-minor fault" rule was, however, vague and unreliable. G. Gilmore & C. Black, Jr., *supra* note 31, at 493. *See* Tide Water Associated Oil Co. v. The Syosset, 203 F.2d 264, 268-69 (3d Cir. 1953) (shipowner liable for half the damages resulting from collision for failure to give danger signal immediately upon observing other ship engaged in highly erratic navigation). The Pennsylvania rule, another attempt to avoid the often inequitable results of the equally divided damages rule, required that where one ship was found to be in violation of a statute intended to prevent collisions, the shipowner had to prove the violation "could not have been" a contributing cause of the accident. The Pennsylvania, 86 U.S. (19 Wall.) 125, 136 (1873). This rule, like the "major-minor fault" rule, served sporadically to neutralize the harsh effect of the equally divided damages rule where there was a showing of vastly disproportionate fault between the parties. G. Gilmore & C. Black, Jr., *supra* note 31, at 495. In National Bulk Carriers v. United States, 183 F.2d 405 (1950), the court held that failure to give a signal indicating a change of course, as required by statute, did not subject the shipowner to liability because the purpose of the signal was to indicate a change of course, and not to serve as a general alarm. *Id.* at 409. *But cf.* Diesel Tanker F.A. Verdon, Inc. v. Stakeboat No. 2, 340 F.2d 465, 468 (2d Cir. 1965) (unlighted vessel lying at anchor at night in violation of statute held liable for half the damages resulting from collision though the other vessel was negligently operated). Like the "major-minor fault" rule, the Pennsylvania rule could be used to escape the mandate of equal division of damages only in the most extreme cases, where the respective faults of the parties were grossly disproportionate. G. Gilmore & C. Black, Jr., *supra* note 31, at 530.

[43] In Union Oil Co. v. The San Jacinto, 409 U.S. 140 (1972), the Supreme Court intended to review the equally-divided damages rule, but was prevented from doing so upon a finding that one of the vessels was totally free from contributory fault. *Id.* at 146.

[44] 421 U.S. 397 (1975).

[45] *Id.* at 411. The court held that the only instances in which damages are to be divided equally are when the parties are equally at fault, or when their relative degrees of fault cannot be determined. *Id.*

[46] Maritime Conventions Act, 1911, 1 and 2 Geo. 5, C. 57, § 1.

[47] 421 U.S. at 411.

[48] *See* Getty Oil Co. v. S. S. Ponce De Leon, 555 F.2d 328 (2d Cir. 1977); Hanover Ins. Co. v. Puerto Rico Lighterage Co., 553 F.2d 728 (1st Cir. 1977); Kinsman Marine

Thus, strict products liability in admiralty and comparative fault in admiralty have existed independently of one another, while comparative fault and strict products liability have been combined in general tort law.[49] In *Houston-New Orleans, Inc. v. Page Engineering Co.*,[50] the plaintiff sued for damages to a barge caused by a malfunction in a free-swinging boom. The defendant was found liable both for negligence and for breach of implied warranty under the sales contract. The court noted, however, that, had there been no contract between the parties, admiralty jurisdiction could lie in tort.[51] The court held that the principles of comparative negligence applied to the case because "where all share in fault for the loss, all should share in bearing the economic burden."[52] The intimation of tort jurisdiction, the upholding of the implied warranty theory, and the application of comparative negligence by the *Page* court all foreshadowed the application of comparative fault principles to strict products liability actions in admiralty.

In the instant case the court held that since all three defendants were part of an overall enterprise which produced and marketed unreasonably dangerous commercial goods, the doctrine of strict products liability[53] rather than negligence should be applied[54] as the basis of liability, and all defendants should share in the allocation of liability for the loss.[55] The court concluded that since the most equitable allocation of responsibility for injury or loss can be achieved by applying comparative fault principles, and since there is no reason why other consumers and society in general should bear the burden of the plaintiff's blameworthy conduct, comparative fault principles should be applied to strict products liability actions in admiralty.[56] In determining exactly what conduct of the plaintiff may be considered in mitigation of damages, the court reasoned that since "all or nothing" defenses such as assumption of risk[57] are inequitable in their operation because they do not distribute responsibility in proportion to fault, all the plaintiff's conduct, regardless of labels attached to it, should be

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Transit Co. v. Great Lakes Towing Co., 532 F.2d 1073 (6th Cir. 1976); *In re* S/S Helena, 529 F.2d 744 (5th Cir. 1976); Griffith v. Wheeling Pittsburg Steel Corp., 521 F.2d 31 (3d Cir. 1975), *cert. denied*, 423 U.S. 1054 (1976); Crown Zellerbach Corp. v. Willamette-Western Corp., 519 F.2d 1327 (9th Cir. 1975).

[49] See notes 31 & 37 and accompanying text *supra*.

[50] 353 F. Supp. 890 (E.D. La. 1972).

[51] *Id.* at 899.

[52] *Id.* at 900.

[53] The court tentatively adopted RESTATEMENT (SECOND) OF TORTS § 402A (1965) as the law of strict products liability for the Ninth Circuit, "at least for this case arising in admiralty." Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129, 1135 (9th Cir. 1977).

[54] *Id.* at 1136-37 (lower court's use of negligence theory alone was improper).

[55] Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co., 565 F.2d 1129, 1135 (9th Cir. 1977) (quoting Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964)).

[56] 565 F.2d at 1139-40.

[57] RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965) regards assumption of risk as a complete defense to a strict products liability action. *But see* Netzel v. State Sand & Gravel Co., 51 Wis. 2d 1, 186 N.W.2d 258 (1971) (holding assumption of risk serves only to reduce damages).

considered in comparing the plaintiff's fault with the defendant's liability.[58]

The court's holding in the instant case is the first application of the principles of comparative fault to an outright strict products liability action in admiralty. This holding seems consistent with the development of the law of strict products liability[59] and with the apparent purpose of the Supreme Court in *United States v. Reliable Transfer.*[60] The intent of the Court in *Reliable Transfer* was to achieve a more just and equitable allocation of liability for damages in cases involving marine collisions and strandings than had been provided for by the equally-divided damages rule.[61] In the general law of torts, application of the comparative fault rule has found growing acceptance.[62] Since admiralty tort law has traditionally expanded by incorporating the prevailing general law of torts,[63] failure to apply the comparative fault rule to strict products liability actions in admiralty could be justified only upon the showing of a valid reason for distinguishing the rules applicable to assessing damages in admiralty collision cases from the rules for measuring damages in strict products liability actions in general tort law. It appears, however, that no such distinction can be made.

Since comparative fault rules apply to maritime personal injury actions under the Jones Act[64] and to actions under the Death on the High Seas Act,[65] it would be somewhat anomalous to require a reduction of damages for contributing fault where a plaintiff is injured or killed, but not where there is property damage due to a collision or stranding. The pure comparative fault rule of *Reliable Transfer* was not limited to actions in negligence, nor was it specifically extended to include actions in strict products liability. The court spoke only of the "faults" of the parties involved. Of course, it may be argued that strict products liability is not concerned with fault[66] and that the rule in *Reliable Transfer* is therefore inapplicable. But the application of comparative fault principles to strict products liability actions requires a determination only of the fault of the plaintiff. The proper comparison is not between the faults of the respective parties, but between the fault of the plaintiff and the liability of the defendant.[67] Such a comparison is not incongruous with the court's intent in *Reliable Transfer.*[68]

In applying the *Reliable Transfer* rule of comparative fault, the court in the instant case has avoided the difficulties involved in determining what conduct of the plaintiff goes beyond ordinary contributory negligence and becomes unreasonable assumption of risk, which the *Restatement (Second) of Torts* regards as a defense to a strict products liability action.[69] Extension of the pure comparative fault rule to strict products liability actions in admiralty seems to be a logical development in admiralty law, from the standpoint of *Reliable Transfer*[70] and from the standpoint of admiralty's history of incorporating the prevailing general law of torts,[71] and as such, the instant decision should be met with approval.

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[58] 565 F.2d at 1139-40. *See generally* text accompanying note 67 *infra.*

[59] See notes 17-26 & 31 and accompanying text *supra.*

[60] 421 U.S. 397, 411 (1975).

[61] *Id.*

[62] See note 37 and accompanying text *supra.*

[63] *See generally* McCune, *supra* note 11.

[64] 46 U.S.C. § 688 (1970).

[65] 46 U.S.C. § 766 (1970).

[66] *But see* note 37 and accompanying text *supra.*

[67] *See* PROSSER, *supra* note 13, § 75 at 492-96. Upon a prima facie showing that the plaintiff was injured by the defendant's product, that the product was defective, and that the defect existed at the time it left the hands of the defendant, the defendant's liability is established. *Id.* § 103, at 671-72.

[68] 421 U.S. at 407.

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[69] *See* note 57 *supra. See also* Epstein, *Products Liability: Defenses Based on Plaintiff's Conduct,* 12 UTAH L. REV. 267, 282 (1968); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk,* 25 VAND. L. REV. 93, 119 (1972).

[70] *See* notes 45 & 60 and accompanying text *supra.*

[71] *See generally* McCune, *supra* note 11.

MORTGAGES—PRIORITY IN BANKRUPTCY—MORTGAGEE NOT IN POSSESSION A GENERAL CREDITOR

William E. Butner, a junior mortgagee[1] of real estate owned by Golden Enterprises, Inc., filed a claim in bankruptcy court to obtain secured creditor status on net rents collected from the mortgaged property after Golden's bankruptcy adjudication[2] and before Butner's purchase of the property.[3] Before his purchase, Butner had made no attempt to sequester the rents, take possession, or make any alternative demand for a receiver for his benefit.[4] In addition, the mortgage contained no clause providing the rents as a specific security interest for the mortgagee.[5] Since the bankruptcy trustee's deed to Butner reserved rents to the trustee,[6] and since there was no clause assigning rents to the mortgagee, the bankruptcy court held that Butner was a general creditor of the Golden estate for his remaining security interest.[7] In an unpublished opinion, the district court reversed the bankruptcy court and upheld Butner's right to the rents on a theory of equity.[8] On appeal to the United States Court of Appeals for the Fourth Circuit, *held,* reversed and remanded. In the absence of a mortgage provision giving the mortgagee a right to rents under state law, a mortgagee who fails to acquire possession or make a timely demand in bankruptcy court for possession or secured status has only the right of a general creditor in the estate. *In re Golden Enterprises, Inc.*, 566 F.2d 1207 (4th Cir. 1977), *certiorari granted sub nom. Butner v. Golden Enterprises, Inc.*, 46 U.S.L.W. 3761 (U.S. June 12, 1978) (No. 77-1410).

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[1] Butner had originally acquired a second mortgage on the Golden realty with others, but since that time had purchased all the interests to accumulate a total mortgage debt of $360,000.00. *In re* Golden Enterprises, Inc., 566 F.2d 1207, 1208-09 (4th Cir. 1977), *cert. granted sub nom.* Butner v. Golden Enterprises, Inc., 46 U.S.L.W. 3761 (U.S. June 12, 1978) (No. 77-1410).

[2] Golden's first action was a petition for arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. §§ 701-799 (1970). After Golden served as a debtor in possession for a limited time and the arrangement never materialized, the proceeding became a liquidating bankruptcy. During the arrangement proceedings an appointed agent collected the rents and paid taxes, insurance interest, and principal payments on the mortgages. After bankruptcy began, a bankruptcy trustee collected all rents and continued payments except for principal payments on the mortgages, which were terminated by order of the bankruptcy court. The resulting remainder sum was $162,971.32, the amount sought by Butner. 566 F.2d at 1209.

[3] Butner successfully bid on the property in a second sale ordered by the district court. His bid of $174,000.00 was consumed by the debt due him, leaving him a balance of $186,000.00 secured by the second mortgage. 566 F.2d at 1209. Interestingly, Butner was originally opposed to a sale of the property and had preferred an abandonment. In one request for abandonment Butner specifically stated a desire to waive a claim for rents. *Id.* at 1210-11.

[4] *Id.* at 1209.

[5] *Id.*

[6] The deed provided that "the accrued rents and the right to collect unpaid accrued rents from [the subject property] are hereby expressly not conveyed, but are reserved to the trustee." *Id.*

[7] *Id.*

[8] *Id.* at 1211. The district court reached this conclusion despite the lack of an assignment of rents clause and the failure to request sequestration. The district court said, "[T]he Court finds no difficulty in determining that equity required that rents collected under the circumstances of this case should go to the secured lienholders rather than to unsecured creditors." *Id.*

The right of a mortgagee to collect rents and profits from mortgaged property was considered as early as 1888 by the United States Supreme Court in *Freedman's Saving & Trust Co. v. Shepherd.*[9] Although the rents were security for the mortgage, the *Freedman* Court held that a mortgagee had no right to rents until he acquired actual possession or made a demand for possession.[10] Thus, a mortgage that permits the mortgagee to sell the property but does not allow him to take possession and claim rents immediately upon default does not convey to the mortgagee any right to rents.[11] Possession, or a demand for possession, has also been required even under a mortgage that expressly authorized a mortgagee to acquire possession on default.[12] The application of these rules to the situation involving a conflict between a mortgagee and a trustee in bankruptcy has resulted in a current division of authority; this division is apparent upon a review of United States courts of appeals cases.

The prevailing view is best expressed in the landmark Eighth Circuit case, *Mortgage Loan Co. v. Livingston.*[13] According to the *Livingston* analysis, a mortgagee who actively participates in a bankruptcy proceeding and takes appropriate steps to secure the rents is entitled to them, so long as his actions serve as the equivalent of a demand for possession.[14] This accepted rule is applicable regardless of whether a mortgage clause pledges the rents as security on default.[15] *Livingston,* therefore, conformed to the traditional requirements for a mortgagee to obtain rents. Additionally, the case established that denial of rents to a mortgagee who has not made a technical demand for possession is inequitable if his actions are equivalent to a demand and the receiver has led him to expect that he will receive the rents.[16] Absent action equivalent to a demand, however, a mortgagee generally has been held to lose his claim to rents.[17]

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[9] 127 U.S. 494 (1888).

[10] *Id.* at 502-03. In summarizing its rule, the Court stated:

> It is, of course, competent for the parties to provide, in the mortgage, for the payment of rents and profits to the mortgagee, while the mortgagor remains in possession. But when the mortgage contains no such provision, and even where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon failure of the mortgagor to perform the conditions of the mortgage, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he takes actual possession, or until possession is taken, in his behalf, by a receiver or until, in proper form, he demands and is refused possession.

Id. (citation omitted).

[11] *Id.* at 503; *see* Dow v. Memphis & L. R.R., 124 U.S. 652, 654 (1888) (railroad mortgage including income as a security does not bind mortgagor to pay rents to mortgagee until possession is surrendered or demand for such is made); Sage v. Memphis & L. R.R., 125 U.S. 361, 377-81 (1888) (same); Teal v. Walker, 111 U.S. 242, 249-50 (1884) (mortgagee not entitled to rents and profits before actual possession is taken, even where the mortgagor had covenanted in the mortgage to surrender the property upon a default).

[12] United States Trust Co. v. Wabash Ry., 150 U.S. 287, 306 (1893); *see* Gilman v. Illinois & Miss. Tel. Co., 91 U.S. 603 (1876). In *Gilman* a mortgage on a revenue road contained a default clause giving mortgage trustees the right to possession and income. The Court held that unless the trustees availed themselves of a remedy through a demand in court, possession would remain in the mortgagor upon default with the income available to all creditors as if the mortgage did not exist. *Id.* at 616-17. *See also* Galveston Ry. v. Cowdrey, 78 U.S. 459, 478-79 (1871) (mortgagors not bound to account to the trustee except upon demand).

[13] 45 F.2d 28 (8th Cir. 1930). In *Livingston* the mortgagee initiated foreclosure proceedings only to have bankruptcy filed several days prior to the sale date and a receiver appointed by a court with a subsequent enjoining of the foreclosure sale. The mortgagee requested foreclosure and possession and notified the receiver of his claim for rents. Hav-

The view that a mortgagee must take some appropriate steps to ensure secured status for rents has been accepted in a plurality of circuits. The Second Circuit has followed the reasoning of the Eighth Circuit in denying rents to a mortgagee who failed to foreclose, sequester, or take alternative action under a mortgage not containing an assignment of rents or a security clause.[18] The Second Circuit has also denied any recovery of rent to a mortgagee who failed to take action prior to the occurrence of bankruptcy, even though the mortgage

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ing initiated such action, the mortgagee assumed that the receiver's separation of the rents from other assets was resulting in an investment of the rents to his own benefit. *Id.* at 32-33.

[14] *Id. But see In re* Van Rooy, 21 F. Supp. 431, 432 (N.D. Ohio 1937) (motion filed by a mortgagee to segregate rents collected by a bankruptcy trustee held not sufficient to give the mortgagee a secured interest in the rents absent possession, request for a receiver, or acquisition for a lien in another action).

[15] 45 F.2d at 31. The court did not treat this as an added strength that would allow the mortgagee to receive the rents in lieu of a receiver's having taken possession. *Id.*

[16] Of importance in the decision is the court's address to the equitable principles involved in bankruptcy and mortgages.

> To hold that the mortgagees had a legal right to these rents and issues under the provisions of their mortgage, but that they should be precluded from recovering same because they had not technically pursued a legal remedy is to overlook the fact that the property was in the control of a court of equity, and that equitable remedies commensurate with the legal rights of the parties should be available. To take from the mortgagees the property to which confessedly they are entitled under the pledge provision of their mortgage, and transfer it to the unsecured creditors of the bankrupt, appeals to us as harsh, inequitable, and unwarranted.

Id. at 34; *see* Brooks v. St. Louis-San Francisco Ry., 153 F.2d 312, 317 (8th Cir. 1946) (in reorganization procedure of a railroad, mortgagee was entitled to a mortgage lien on income upon demand); First Sav. Bank & Trust Co. v. Stuppi, 2 F.2d 822, 828 (8th Cir. 1924) (mortgagee entitled to rents where he had a receiver appointed in state court to collect rents for his benefit). *See also* Atlantic Trust Co. v. Dana, 128 F. 209 (8th Cir. 1903).

[17] *See* Tower Grove Bank & Trust Co. v. Weinstein, 119 F.2d 120, 123 (8th Cir. 1941) (despite a mortgage pledging rents as security, a mortgagee is not entitled to rents until taking possession, having a receiver appointed for his benefit, or demanding possession). *See generally* 1 W. COLLIER, BANKRUPTCY MANUAL § 70.12, at 950 (2d ed. 1976).

[18] *In re* Humeston, 83 F.2d 187, 189 (2d Cir. 1936).

contained a default agreement.[19] In addition, an equitable argument for a mortgagee's benefit has been expressly rejected by the Second Circuit on one occasion.[20]

Aligning itself with the Second Circuit, the District of Columbia Circuit has held that a receiver's claim to rents has priority over a mortgagee's claim where the mortgagee has taken no steps to acquire possession.[21] Similarly, the Tenth Circuit has required that a mortgagee be active in seeking rents during bankruptcy in order to be entitled to them.[22] However, the court noted that the mortgagee may satisfy the requirement of active participation by an attempt to foreclose coupled with the existence of a state court appointed receiver who is approved by a bankruptcy court and serves for the mortgagee's benefit.[23] A number of other circuits have also held that state appointment of a receiver limits the action of a bankruptcy court in collecting and holding rents.[24] Furthermore, the Ninth Circuit has recognized that institution of foreclosure proceedings may be the equivalent of a demand for possession. In *Pollack v. Sampsell,*[25] the court allowed a mortgagee to recover proceeds from the sale of a crop held by a bankruptcy trustee. The mortgagee had instituted foreclosure proceedings, but notice of the sale was not given until after bankruptcy ensued; thus, the foreclosure was restrained and the mortgagee prevented from taking possession.[26] The court recognized that where a mortgagee has taken appropriate steps prior to bankruptcy or, by a timely application to bankruptcy court, has acted to take rents for satisfaction of the mortgage, it is a court's duty to preserve the rents for the mortgagee.[27] In this respect, *Pollack* expanded the mortgagee's rights upheld in *Livingston* to include a right to rents even when the mortgagee's initial action to claim rents was after bankruptcy adjudication.[28] The Ninth Circuit has also granted relief to a mortgagee where there has been an absolute assignment of rents by the mortgagor to the mortgagee rather than a mere security agreement covering rents.[29] However, in the absence of any positive steps after the beginning of bankruptcy or an absolute assignment of rents, the Ninth Circuit has held that all rents collected between bankruptcy and sale of the property go to the bankruptcy trustee for distribution to the general creditors of the estate.[30]

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[19] Prudential Ins. Co. v. Liberdar Holding Corp., 74 F.2d 50, 51-52 (2d Cir. 1934) (where a mortgagee did not file a petition for foreclosure or for collecting rents until after a receiver was in the mortgagor's position, the court held, despite a mortgage default agreement, that the rents collected by the mortgagor and receiver belonged to the general assets and the mortgagee could only recover rents accruing after his petition was filed); *see* Nash v. Onondaga Hotel Corp., 140 F.2d 209, 211 (2d Cir. 1944) (where an after-acquired property clause included furniture given to a debtor, the furniture became the property of the debtor and subsequently the general creditors since the mortgagee would have to sequester or file a claim prior to bankruptcy to obtain a secured lien); *In re* Hines, 88 F.2d 423, 425 (2d Cir. 1937) (holding a mortgagee had no right to rents collected by a bankruptcy trustee until possession was surrendered or a receiver appointed); *In re* McCrory Stores Corp., 73 F.2d 270, 271-72 (2d Cir. 1934) (bankruptcy trustee entitled to rents accruing before a default where the mortgage provided for the mortgagee to receive such rents upon default). In *In re* Cigar Stores Realty Holdings, Inc., 69 F.2d 823 (2d Cir. 1934), a mortgagee petitioned for rents four months after bankruptcy was filed. The court held against the mortgagee but on the distinguishable grounds that the foreclosure sale provided an assignment of all prior rents to the purchaser and a lack of a deficiency existed after the sale, a deficiency being a prerequisite to a mortgagee's receiving rents prior to gaining possession. *Id.*

[20] *See In re* Cigar Stores Realty Holdings, Inc., 69 F.2d 823, 823 (2d Cir. 1934).

[21] Hardee v. American Sec. & Trust Co., 77 F.2d 382, 385 (D.C. Cir.), *cert. denied,* 296 U.S. 595 (1935).

[22] Central States Life Ins. Co. v. Carlson, 98 F.2d 102, 105 (10th Cir. 1938).

[23] *Id.* at 105-06. In *Carlson* the mortgagee had filed with the bankruptcy court for a receiver, which was denied. The court noted the importance of possession by a receiver appointed by a state court instead of the mortgagor. This gave the mortgagee a stronger argument that the receiver was serving for his benefit. *Id.* at 106; *see* 11 ROCKY MT. L. REV. 65, 67 (1938) (reviewing *Carlson*).

[24] *See, e.g.,* Groves v. Fresno Guar. Sav. & Loan Ass'n, 373 F.2d 440, 442-43 (9th Cir. 1967); Emil v. Hanley, 130 F.2d 369, 370-71 (2d Cir.), *aff'd,* 318 U.S. 515 (1942); *In re* Standard Baths, 85 F.2d 110, 112 (2d Cir.), *cert. denied,* 299 U.S. 604 (1936); Russell v. Edmondson, 50 F.2d 175, 175 (5th Cir. 1931); First Sav. Bank & Trust Co. v. Stuppi, 2 F.2d 822, 827-28 (8th Cir. 1924). *See generally* Comment, *The Mortgagee's Right to Rents,* 50 YALE L.J. 1424, 1445-46 (1941).

[25] 174 F.2d 415 (9th Cir. 1949).

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[26] Notice of the foreclosure sale was not given until after bankruptcy ensued, but the subsequent stay by the bankruptcy court prevented the mortgagee from achieving possession before the sale of the crops (rent). The mortgagee had objected with the bankruptcy referee as early as one week following the bankruptcy filing. *Id.* at 419. *See generally* Note, *The Necessity of Possession by the Mortgagee to the Creation and Maintenance of His Lien on Unsecured Crops,* 76 U. Pa. L. Rev. 851, 851-56 (1928).

[27] 174 F.2d at 419-21. *But see* Avidon v. Halpert, 145 F.2d 884, 885 (2d Cir. 1944) (denial of a creditor's claim because the time for filing expired; court stated the general rule that there had to be a "timely assertion" by the creditor against the debtor for his claim).

[28] The court recognized the diligence of the mortgagee to indicate that he would probably have sought a claim on the rents had bankruptcy not even intervened. In looking to the diligence and timeliness of the mortgagee in acting to secure the rents, the court mentioned a number of factors that served in the mortgagee's favor: (1) action to foreclose the property while the crop still existed in place, (2) the fact that the mortgagee would have realized the sale but for the restraining order, (3) an assertion of probable deficiency in foreclosure, (4) the moving for an order vacating the temporary stay and granting permission to proceed with foreclosure, and (5) a response to an order of the receiver requesting that cause be shown why the mortgagee should have a right in the crop, with the response outlining an unfairness to the mortgagee compared to other subordinate creditors. 174 F.2d at 419.

[29] *See In re* Ventura-Louise Properties, 490 F.2d 1141, 1145 (9th Cir. 1974) (where a second mortgage specifically stated "assignment of rents" to the mortgagee on default, mortgagee was entitled to the rents even though he took no action to collect rents, obtain sequestration, or secure permission for foreclosure until after bankruptcy began).

[30] *See In re* Hotel St. James Co., 65 F.2d 82 (9th Cir. 1933). The court held against the claim of a mortgagee for rents and profits collected by a receiver on the ground that the mortgagee had taken no steps either before or after bankruptcy to take possession of the property or to claim rents until after the mortgaged property had been sold. *Livingston* was distinguished due to the lack of a request in *Hotel St. James* to the bankruptcy court. The general rule of *Freedman* was incorporated in the case in a bankruptcy context. *Id.* at 84-85; *see* American Trust Co. v. England, 84 F.2d 352, 356-57 (9th Cir. 1936) (having

In contrast to the prevalent view discussed above, an opposing rule favoring the mortgagee was promulgated in the Third and Seventh Circuits based on an equity theory.[31] Early Third Circuit case law[32] found principles of equity a useful device to circumvent the restrictive requirements of *Freedman's Savings & Trust Co. v. Shepherd.*[33] Noting that bankruptcy proceedings prevent a mortga-

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petitioned for sequestration one month following the appointment of a bankruptcy trustee, the mortgagee was held entitled to rents following such filing); *In re* Brose, 254 F. 664, 666-68 (2d Cir. 1918) (*Hotel St. James* reasoning applied). In Investors Syndicate v. Smith, 105 F.2d 611 (9th Cir. 1939), the court recognized the rule that a bankruptcy court has the power to grant a sequestration of rents to a mortgagee upon application by the mortgagee. Where this is permitted, the mortgagee has a right to the rents from the date of the filing of the petition. But in this instance the court denied the request for sequestration and concerned itself with the scope of exercising such power. In its view the mortgagee was to be denied a sequestration since otherwise he would end up in a better position due solely to the occurrence of the bankruptcy proceeding. *Id.* at 621-22.

[31] The theory is primarily premised on the ground that bankruptcy takes possession away from the mortgagor and deprives the mortgagee of his ordinary remedy. To rectify this, the mortgagee should be given secured status for net income after the payment of proper administrative expenses, operating expenses, and taxes, despite a lack of formal demands or petitions to a bankruptcy court. *See* Central Hanover Bank & Trust Co. v. Philadelphia & Reading Coal & Iron Co., 99 F.2d 642, 645 (3d Cir. 1938) (mortgagee with a deficiency entitled to net income of mortgaged property from the date of bankruptcy adjudication without a prior demand necessary). *But cf. In re* Philadelphia & Reading Coal & Iron Co., 117 F.2d 976, 978 (3d Cir. 1941) (mortgagee not allowed to receive income from property (stocks and bonds) of a debtor going through reorganization, especially where this would prejudice the business reorganization of the debtor and an express agreement existed on the subject). *See generally* Aug, *Recent Trends in the Application of Equitable Principles of Bankruptcy,* 43 REF. J. 109 (1969).

> The bankruptcy court has exercised these equitable powers in passing on a wide range of problems arising out of the administration of bankrupts' estates. These have been invoked to the end that (1) fraud will not prevail, (2) substance will not give way to form, (3) technical considerations will not prevent substantial justice from being done.

Id. at 110 (citing Pepper v. Litton, 308 U.S. 295 (1934)). The Third Circuit use of equity is also mentioned in 45 HARV. L. REV. 901, 905 (1932) (discussing the view that a mortgagee is an "owner" after bankruptcy).

[32] *See In re* Industrial Cold Storage & Ice Co., 163 F. 390 (E.D. Pa. 1908). In *Cold Storage,* a mortgagee sought rents collected from the time of a bankruptcy petition until foreclosure. Although the mortgage contained a security clause pledging the rents, and state laws would have given the mortgagee a preference to the rents, the court followed the reasoning of Freedman's Savings & Trust Co. v. Shepherd, 127 U.S. 494 (1888), and held the mortgagee could not attain the rents on these grounds, none of the *Freedman* tests having been pursued. In an unprecedented move, however, the court held the mortgagee entitled to the rents on the laws of equity. Its decision was based on Wolf's Appeal, 106 Pa. 545, 552 (1884) (establishing a mortgagee as the equitable owner of property under a mortgage and thus deserving of the rents as an assurance of his lien). *Id.* at 393. In *In re* Torchia, 188 F. 207 (3d Cir. 1911), judgment creditors were allowed a claim to rents despite the absence of an assigning rent clause. Noticeably, the court refused to permit the creditors to have a claim to the proceeds from the sale of the property itself. *Id.* at 208.

[33] 127 U.S. 494 (1888). The three tests outlined in *Freedman* are (1) acquiring actual

gee from resorting to state remedies, the Third Circuit applied equitable principles in *Bindseil v. Liberty Trust Co.*[34] to protect the mortgagee's interest as if bankruptcy had not intervened.[35] The Third Circuit solidified its position in *Associated Co. v. Greenhut*,[36] reaffirming the *Bindseil* rule that rents collected between bankruptcy adjudication and sale under foreclosure belonged to the mortgagee claiming a deficiency, based on a theory of equity.[37] In *Greenhut*, the Third Circuit also recognized that a mortgage provision assigning rents to the mortgagee upon default was absolute,[38] bringing the court in line with the reasoning of the Ninth Circuit on this point.[39] A similar pattern has been followed in the Seventh Circuit with *In re Wakey*.[40] The Seventh Circuit reasoned that a mortgagee acquires a right to rents during bankruptcy, based on the premise that a receiver appointed by the bankruptcy court collects and holds rents for the benefit of the mortgagee.[41]

Outside of the fundamental split among the named circuits over the inter-

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possession, (2) possession being acquired through a receiver, and (3) demanding possession despite a refusal. *Id.* at 502-03. See note 10 *supra.*

[34] 248 F. 112 (3d Cir. 1917).

[35] *Id.* at 115. In *Bindseil,* the mortgagee was held entitled to rents from the time of bankruptcy adjudication to a foreclosure establishing a deficiency. *Id.* at 114. *See generally* Comment, *supra* note 24, at 1395-97 (author discussing import of *Cold Storage, Bindseil,* and *Torchia,* and describing bankruptcy in *Bindseil* as creating an "automatic activation" of a mortgagee's right to rents in respect to state laws); 45 HARV. L. REV. 901, 904 (1932) (quoting *Bindseil* in regard to "equitable remedies" replacing lost "legal remedies" to protect a mortgagee's lien).

[36] 66 F.2d 428 (3d Cir.), *cert. denied,* 290 U.S. 695 (1933).

[37] 66 F.2d at 429. *See generally* Berick, *The Mortgagee's Right to Rents,* 8 U. CIN. L. REV. 250, 292-94 (1934).

[38] 66 F.2d at 429. In *In re* Pittsburgh-Duquesne Dev. Co., 482 F.2d 243 (3d Cir. 1973), the mortgagee had an assignment clause stating that upon default all leases and rents would be assigned to the mortgagee with the mortgagee to have the right to take possession and use the rents for taxes, expenses, and the mortgage debt. When bankruptcy was filed the court stayed the enforcement of all liens and the trustee subsequently used some of the rents to pay expenses on another property in the bankrupt estate. The mortgagee sought reimbursement of these rents to aid in paying taxes on the property following purchase at his own foreclosure sale more than one and one half years later. Although the mortgagee did not take any affirmative action during this period, the court recognized the rents as an equitable part of the agreed security, especially in light of the assignment clause. The use of the rent for taxes, a prescribed priority, was also relevant in the court's decision. *Id.* at 245-46.

[39] See note 29 and accompanying text *supra.*

[40] 50 F.2d 869 (7th Cir. 1931).

[41] In *Wakey* the mortgagee was prevented from proceeding with foreclosure on appointing a receiver for collection of rents due to the bankruptcy proceedings and a lack of consent from the bankruptcy court. The court held that the bankruptcy trustee was, therefore, acting as the mortgagee's receiver. Thus, the mortgagee had primary priority to the rents. *Id.* at 872; *accord, In re* Chicago R.I. & P. Ry. v. Traphagen, 155 F.2d 889, 892 (7th Cir. 1946), *rev'd per curiam on other grounds sub nom.* Fleming v. Traphagen, 329 U.S. 686 (1946); *In re* De Tamble, 88 F.2d 893, 894-95 (7th Cir. 1937). *But see In re* Clark Realty Co., 234 F. 576, 582 (7th Cir. 1916) (an early Seventh Circuit case not following an equitable line of reasoning).

play of equity, the remaining circuits have not developed any concrete guidelines dealing with the specific conflict. The Fifth Circuit has extended equity relief to a mortgagee in regard to the marshalling of assets.[42] Yet, a mortgagee has been denied relief in the Fifth Circuit where state law required possession or foreclosure to establish priority.[43] The First Circuit has permitted a mortgagee to recover rents where he has taken affirmative action after an involuntary petition for bankruptcy but before the actual adjudication of bankruptcy.[44] A mortgagee has similarly been able to establish priority to rents in the Sixth Circuit, but a timely positive request for possession has been required.[45] Until the present, the Fourth Circuit had failed to rule directly on the problem. In a recent decision, *Fidelity Bankers Life Ins. Co. v. Williams,*[46] that court allowed a mortgagee to recover rents where a mortgagor executed both an assignment of rent and a mortgage security agreement.[47] Recovery was allowed despite the mortgagee's failure to acquire possession, request sequestration, or seek a receiver.[48] *Williams* did not, however, indicate the outcome that would have resulted absent the supplemental agreement.

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[42] Merchants' & Mechanics' Bank v. Sewell, 61 F.2d 814 (5th Cir. 1932). In *Merchants'* the second mortgagee filed a petition for rents held by the bankruptcy trustee after the bankruptcy petition was filed but before the sale of the property by the first mortgagee, an insurance company, which also had secured assets in insurance policies. The Court held the second mortgagee was equitably entitled to the balance and that any overflow of assets realized by the insurance company on the policies should be treated as part of the proceeds of the land to enable the second mortgagee to benefit from his security. *Id.* at 816. Importantly, the Fifth Circuit recognized that a bankruptcy court should apply equitable principles and stated in part:

> [I]t is an established rule in that state that after a debtor's insolvency a creditor holding a mortgage or a security deed covering his land has, if the proceeds of the sale of the land are insufficient to pay the secured debt, an equitable right to have the rents and profits realized from the land after the debtor's insolvency applied on the secured debt.

Id. at 817 (citations omitted); *accord,* Victor Bruen Assocs., Inc. v. Glass, 338 F.2d 826, 829 (9th Cir. 1964) (bankruptcy court should enforce marshalling of assets where it will not prejudice a prior creditor since it is based on equity, but not in the instant case where a risk of loss to a prior mortgagee existed); Textile Banking Co. v. Widener, 265 F.2d 446, 450 (4th Cir. 1959) (accepting the marshalling of assets as an equitable principle in charging laborers' liens against a fund realized from a sale of property on one lien and not against another insufficient lien); *cf.* Commercial Credit Co. v. Davidson, 112 F.2d 54, 58 (5th Cir. 1940) (purchase-money creditor before a bankruptcy adjudication will not be defeated by a trustee in bankruptcy due to having a lien equitably and legally). *But see* National Oats Co. v. Long, 219 F.2d 373, 374 (5th Cir. 1955) (deeds of trust in Mississippi held invalid as against a receiver or trustee in bankruptcy and thus deed trustee was not secured, but invalidity distinguishable due to defective descriptions in documents).

[43] *In re* Thomas, 36 F.2d 221, 222 (5th Cir. 1929) (under Texas law providing that mortgagor in possession is not liable to mortgagee for rents before a foreclosure sale, court held mortgagee not entitled to rents accruing between beginning of foreclosure proceedings and the actual sale, bankruptcy having ensued between the two events). The *Thomas* and *Merchants'* cases seem to establish firmly that the Fifth Circuit will look to state law to determine an outcome in the mortgagee's favor.

A lack of Fifth Circuit cases directly concerned with other state bankruptcy effects makes an inquiry into mortgagor-mortgagee relationships necessary. Buzzanca v. Hagwood, 265 Ala. 404, 91 So. 2d 703, 705 (1956) (mortgagee must make a demand or establish his claim for rents before being able to acquire them from a mortgagor prior to foreclosure); Ittman v. Kracke & Flanders Co., 12 La. App. 672, 127 So. 106, 107 (1930) (mortgagee must enforce statutes to establish a lien for income on mortgaged property); Wilsford v. Johnson, 141 Miss. 739, 753-54, 105 So. 738, 738 (1925) (mortgagee not able to establish a lien over mortgagor for rents unless agreed upon); Pasco v. Gamble, 15 Fla. 562, 563-64 (1876) (mortgagor has a right to rents until possession is given up to the mortgagee); Myers v. Estell, 48 Miss. 372, 401 (1873) (mortgagee must acquire possession or foreclosure to claim rents).

[44] *In re* Cox, 15 F.2d 764 (1st Cir. 1926). A mortgagee made an entry to foreclose eight

In addition to considering the variation in circuits, state laws must be carefully scrutinized to determine their effect on a mortgagee's rights.[49] For example, state laws recognizing assignments of rent as valid will be a deciding factor.[50] Although state laws have proved to be pertinent in circuits following the prevailing view outlined by *Mortgage Loan Co. v. Livingston,*[51] they are of

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days after an involuntary petition for bankruptcy was filed. Bankruptcy adjudication occurred five days later and permission to foreclose was not received until some time later. The court held the mortgagee could receive the rents between the entry and the date of permission to foreclose since not to allow it would destroy his security. The court recognized that an involuntary petition did not cause an automatic stay of the mortgagee's rights. *Id.* at 965. Questions concerning a mortgagee's rights if his actions had all transpired after bankruptcy were left unanswered. *See* 40 Harv. L. Rev. 775-76 (1927) (reviewing *Cox* the author comments, "[T]he decision in the principal case might be supported as an exercise of equitable discretion in disposing of the rents.").

[45] *In re* American Fuel & Power Co., 151 F.2d 470 (6th Cir. 1945). A mortgagee was held able to establish a first priority for rents but it was conditioned on two factors: (1) the mortgagee had to assert his rights by a positive action for possession and (2) this assertion had to occur before any other lien by a third party had been brought. *Id.* at 481. In this analysis the Sixth Circuit seems to align itself opposite the equity theory courts. Importantly, however, the Sixth Circuit followed state law where the mortgaged property was located. *Id.*

State mortgage law is helpful absent Sixth Circuit rulings in various states. *See, e.g.,* Toebe v. Wulfing, 140 S.W.2d 116, 119 (Mo. 1940) (absent taking possession or foreclosing, a mortgagee has no right to rents); Cumberland Trust Co. v. Bart, 15 Tenn. App. 138, 150-51 (1932) (mortgagor entitled to rents as long as in possession and mortgagee not entitled to a lien on rents absent mention in the mortgage); Hounshell v. Clay Fire Ins. Co., 81 Ky. 304, 306-07 (1883) (absent taking possession or foreclosure, mortgagee has no right to rents).

[46] 506 F.2d 1242 (4th Cir. 1974).

[47] *Id.* at 1243. The mortgagee was held entitled to rents accruing between the adjudication of bankruptcy and the foreclosure sale. *Id.*

[48] *Id.*

[49] *Id.*

[50] *In re* Ventura-Louise Properties, 490 F.2d 1141 (9th Cir. 1974) (citing Kinnison v. Guaranty Liquidating Corp., 18 Cal. 2d 256, 262, 115 P.2d 450, 453 (1941) (recognizing an absolute assignment of rents upon a default if so intended by the parties)). *But see In re* Morris White Holding Co., 52 F.2d 499, 501 (S.D.N.Y. 1931) (sequestration of rents by a second mortgagee with an assignment clause allowed to commence only from the date of the present petition and not from the date of the bankruptcy adjudication).

[51] 45 F.2d 28 (8th Cir. 1930); *see* Tower Grove Bank & Trust Co. v. Weinstein, 119 F.2d 120 (8th Cir. 1941); *In re* Humeston, 83 F.2d 187 (2d Cir. 1936); *In re* Hotel St. James

special importance in those circuits that have failed to align themselves with any definitive theory.[52] Thus, different outcomes within the same circuit are a continuing reality.[53]

In the instant decision, the court reviewed the two competing theories in the circuits and concluded that the mortgagee must secure possession of the property or proceed with a comparable action or request in bankruptcy court to acquire a right to rents.[54] This result was favored since a similar procedure would be followed in the state court system absent bankruptcy proceedings.[55] Following state law,[56] the court observed that since petitioner Butner had not acquired possession, requested sequestration of rents or appointment of a receiver, and had taken no formal action to proceed with foreclosure under bankruptcy rule 701, the petitioner had failed to establish himself as a secured creditor before the bankruptcy court and was not entitled to the rents.[57] The district court's assumption that the temporary receiver acting before bankruptcy had made unnecessary a second request for a receiver during bankruptcy was termed "erroneous."[58] Since bankruptcy had ensued and the appointment of a bankruptcy trustee had terminated the duty of the existing receiver, the court reasoned that Butner had to proceed formally in bankruptcy court to establish a secured lien.[59] The majority also concluded that there was no evidence to indicate whether Butner would have sought a security interest in the rents absent the bankruptcy proceeding.[60] Finally, the court rejected the district court's view

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Co., 65 F.2d 82 (9th Cir. 1933); *In re* Brose, 254 F. 664 (2d Cir. 1918).

[52] *See, e.g., In re* American Fuel & Power Co., 151 F.2d 470 (6th Cir. 1945); Merchants' & Mechanics' Bank v. Sewell, 61 F.2d 814 (5th Cir. 1932); *In re* Cox, 15 F.2d 764 (1st Cir. 1926). *See generally* 3 H. REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 1214.01, at 57 (5th ed. 1957).

[53] See note 43 *supra.*

[54] *In re* Golden Enterprises, Inc., 566 F.2d 1207, 1209-10 (4th Cir. 1977), *cert. granted sub nom.* Butner v. Golden Enterprises, Inc., 46 U.S.L.W. 3761 (U.S. June 12, 1978) (No. 77-1410). The court quoted from an earlier Fourth Circuit decision, Fidelity Bankers Life Ins. v. Williams, 506 F.2d 1242, 1243 (4th Cir. 1974), where the theories were categorized as (1) an equitable outcome for the secured creditor over an unsecured creditor, followed in the Third and Seventh Circuits, and (2) the requirement that the secured creditor take possession or secure rights by another action in bankruptcy court, followed in the Eighth and Ninth Circuits. See notes 47 & 48 and accompanying text *supra.*

[55] 566 F.2d at 1210.

[56] *Id.* North Carolina law requires a mortgagee to be in possession of the mortgaged property to acquire rents unless the mortgage has a specific clause or agreement extending such rights to him. Gregg v. Williamson, 246 N.C. 356, 98 S.E.2d 481 (1957); Kistler v. Development Co., 205 N.C. 755, 172 S.E. 413 (1934); Killibrew v. Hines, 104 N.C. 182 (1889).

[57] 566 F.2d at 1210-11.

[58] *Id.*

[59] *Id.* at 1210.

[60] *Id.* The court based its conclusion on several factors: (1) after several requests by Butner for abandonment and subsequent denials, he made no further requests, (2) Butner stated he would waive a rent claim at one request for abandonment, (3) Butner was originally opposed to the selling of the property by the bankruptcy trustee. His failure to pursue the matter further with correct methods of securing his interest indicated a lack of desire for the rents prior to bankruptcy. See note 3 *supra.*

that equitable principles should serve as an important factor in giving the petitioner a right superior to general unsecured creditors.[61]

In a dissenting opinion, Judge Bryan attacked the majority's rigid requirement that a mortgagee renew his requests and procedural actions before a bankruptcy court following a change from an arrangement to actual bankruptcy.[62] Agreeing with the district court, he felt the "technical" approach by the majority emphasizing procedure caused a great inequity since the two steps were actually inseparable in regard to the petitioner's action.[63] On this basis, Judge Bryan argued that under 11 U.S.C. § 752,[64] any order entered during the arrangement was to be enforced as one occurring after voluntary bankruptcy and that a petition for arrangement was equal to a petition for voluntary bankruptcy under 11 U.S.C. § 752 and § 778(a)(2).[65] The dissent further answered the majority's charge that petitioner did not attempt to foreclose by reiterating the fact that Butner had earlier requested an abandonment.[66] Judge Bryan concluded by stating that he would remand to the district court for a determination of the effect that application of equitable principles would have on the factual situation.[67]

The majority's decision in the instant case clearly places the Fourth Circuit in the prevailing line of case law concerning mortgagee-trustee conflicts.[68] In order to acquire priority to rents collected by a receiver or a bankruptcy trustee, a mortgagee in the Fourth Circuit must bring an action during the bankruptcy adjudication or subsequent proceedings. The procedure required for bringing an action to recover rents is methodically technical and structured. The decision, therefore, directly supports the doctrine outlined in *Freedman's Savings & Trust Co. v. Shepherd*[69] and falls into place with decisions of the Second, Eighth, Ninth, and District of Columbia Circuits. Importantly, it answers many of the questions that were left unanswered in *Fidelity Bankers Life Ins. Co. v. Williams.*[70] Yet, *Fidelity Bankers* may also be distinguished, since there was no security or assignment agreement in the instant case similar to that in *Fidelity Bankers.*[71] Assignment clauses, therefore, may still provide a persuasive mortgagee argument despite the strict procedure established by the majority. Nonetheless, a more detailed discussion on the effect of such a clause would have further clarified the Fourth Circuit's position.

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[61] 566 F.2d at 1211. The court pointed out that if the bankrupt estate were to receive the rents, there was a possibility of much of the rental amount being used for attorneys' fees. The court gave no view as to what role equity might play in the entire situation, but it recognized that the principle was not adequate for the instant question. *Id.*

[62] 566 F.2d at 1211-12 (Bryan, J. dissenting).

[63] In surmising the injustice caused by the majority, Judge Bryan stated, "The facts, I think, sustain the District Judge and reveal the majority as sacrificing substance to form, for in regard to the request and order, there was no such decisive break in the two stages of the case as to warrant this sacrifice." *Id.* at 1211.

[64] *Id.* at 1212. 11 U.S.C. § 752 (1970) states that the "rights, duties, and liabilities of creditors" of a debtor are to be the same whether a petition is filed before, during, or after bankruptcy adjudication.

[65] 566 F.2d at 1212. 11 U.S.C. § 778(a)(2) (1970) provides, in part, that a petition for arrangement should be conducted "in the same manner and with like effect as if a voluntary petition for adjudication in bankruptcy had been filed . . . ."

[66] 566 F.2d at 1212.

[67] *Id.* at 1213.

[68] See notes 12 & 13 and accompanying text *supra.*

[69] 127 U.S. 494 (1888). See note 9 *supra.*

[70] 506 F.2d 1242 (4th Cir. 1974).

The technical mechanics of the decision will serve as valuable precedent for both mortgagees and trustees in bankruptcy in the Fourth Circuit because the majority has clearly outlined methods that mortgagees may use to retain priority to rents. This is, perhaps, the most favorable aspect of the decision. Nonetheless, an equitable outcome for the mortgagee could arguably have been achieved without sacrificing clarity. An equity theory would automatically ensure a mortgagee's priority and would additionally simplify the distribution of assets in bankruptcy proceedings. In this manner substance would never yield to form.[72] The majority's emphasis on procedure appears unduly harsh in respect to separating a prebankruptcy receivership totally from a subsequent appointment of a bankruptcy trustee. In light of this, the dissenting opinion by Judge Bryan, advocating a more lenient approach concerning the technicalities of bankruptcy stages, allows a more equitable and desirable result.[73] The dissent does not openly advocate automatic rights for a mortgagee, but does oppose the placement of formal procedures over substantive actions and intentions.[74]

The instant decision indicates that the Fourth Circuit will allow the intervention of bankruptcy to stiffen the requirements necessary for a mortgagee to preserve his security.[75] Since bankruptcy operates to hinder a mortgagee in regard to foreclosure in any case, the placing of additional burdens of formality and timing on a mortgagee reflects a distinct unfairness. Although a mortgagee might be required to obtain possession under state law absent bankruptcy, his opportunity there is ultimately more assured than under bankruptcy, even without the strictness outlined by the majority. The decision's procedural prerequisites permit an imbalance to occur in favor of the bankruptcy trustee. Regardless, one must still look to state law for mortgagee rights. In this respect the decision is limited to the Fourth Circuit and to the purview of state statutes and case law affecting mortgagees' rights.[76] It may still serve as a persuasive authority, however, for those circuits that have failed to act directly on the point. Whether the Fourth Circuit's strict standard will prevail in circuits leaning toward equity will depend on the peculiar distinguishable actions of a mortgagee. While the

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[71] 566 F.2d at 1209.

[72] See note 31 *supra.*

[73] See notes 62 & 63 and accompanying text *supra.*

[74] Also noteworthy is the fact that Judge Bryan did not openly support a principle of equity in his dissent. Concerning equity, he favored a remand for a determination on the facts. This tends to cloud any clear split within the Fourth Circuit itself concerning the use of equitable principles for mortgagee relief. See note 67 and accompanying text *supra.*

[75] This is in direct contrast with the result reached in several early cases based on equitable theories. See notes 31 & 32 *supra. See generally* 45 HARV. L. REV. 901, 904 (1932) (discussing the detrimental effects of bankruptcy on a mortgagee and the "unclear" options open to him).

[76] See note 56 and accompanying text *supra.*

First and Fifth Circuits have thus far leaned toward equity where enforceable under state laws,[77] a protrustee decision is predictable where the mortgagee is required to acquire possession or an equivalent substitute under general mortgage law. Thus, one may speculate that in many Fifth Circuit states such as Mississippi, Alabama, and Florida, with precedents requiring a mortgagee to take possession or a comparable action to preserve mortgage liens in absence of bankruptcy, a result similar to that reached in the Fourth Circuit may occur.[78] In the Sixth Circuit, with a clear support for state mortgage law, especially where the mortgagee must act to establish a lien, the majority decision may very well influence future non-equity oriented results.[79] It is manifestly established, however, that the Fourth Circuit will delve into mortgage-bankruptcy cases with a fine eye fixed upon detailed, established procedure. A mortgagee is on notice that his security is in danger, absent noticeable action, and dependent on state statutory and case law guidelines.

Harry Edward Neblett, Jr.

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[77] See notes 42 & 44 and accompanying text *supra.*

[78] These Fifth Circuit states have precedent similar to North Carolina in the present case. This combined with the Fifth Circuit's own tendency to look to state laws causes a strong presumption that the Fifth Circuit would follow the same reasoning of the Fourth Circuit. See note 43 *supra.*

[79] See note 45 *supra.*

CONSTITUTIONAL LAW—DUE PROCESS—FOSTER PARENTS HAVE NO LIBERTY INTEREST IN FOSTER CHILDREN

Plaintiff foster parents, Robert and Mildred Drummond, brought suit under 42 U.S.C. § 1983[1] seeking injunctive relief against the defendant state adoption agency to prevent it from removing Timmy, a two-year-old child, from the Drummonds' home where he had lived since the age of one month.[2] The plaintiffs contended, *inter alia,*[3] that since they were Timmy's "psychological parents"[4] and since they were not given a hearing,[5] the agency's removal decision constituted a violation of the familial right to privacy protected by the due process clause of the fourteenth amendment.[6] Finding no deprivation of fourteenth amendment rights, the United States District Court for the Northern District of Georgia dismissed the complaint.[7] On appeal, an independent counsel argued that Timmy's right "to a stable environmment" had been violated because of the lack of procedural due process.[8] A three judge panel for the United States Court of Appeals for the Fifth Circuit, with one judge dissenting, accepted both the Drummond's and the independent counsel's contentions and reversed the lower court's decision.[9] On rehearing en banc, *held*, affirmed the lower court's dismissal of the complaint. The state-created relationship between foster parents and children does not give rise to a constitutionally protected liberty interest and is not within the familial right to privacy protected by the fourteenth amendment. *Drummond v. Fulton County Department of Family & Children's Services*, 563 F.2d 1200 (5th Cir. 1977) (en banc), *certiorari denied*, 46 U.S.L.W. 3777 (U.S. June 19, 1978) (No. 77-1381).

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[1] 42 U.S.C. § 1983 (1970).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. See generally Cochran, *Civil Rights Litigation in the Fifth Circuit: Part 1*, 48 MISS. L.J. 377 (1977).

[2] Drummond v. Fulton County Dept. of Family & Children's Serv., 408 F. Supp. 382 (N.D. Ga. 1976), *rev'd,* 547 F.2d 835, *rev'd en banc,* 563 F.2d 1200 (5th Cir. 1977), *cert. denied,* 46 U.S.L.W. 3777 (U.S. June 19, 1978) (No. 77-1381).

Timmy was placed in the home of Robert and Mildred Drummond by the Children's Services Agency in an emergency situation. 547 F.2d at 837. Under GA. CODE ANN. § 24A-1403(a)(1) to (2)(f) (Supp. 1977), "a child alleged to be deprived may be placed or detained" in a licensed foster home, or in any juridically approved home, or in any facility under the direction of a licensed child welfare agency.

[3] The Drummonds, a white couple, also alleged that the agency's decision to remove the child from their home was based solely on racial grounds since Timmy was a child of mixed black and white parentage. The district court, however, found that race was not used in an automatic fashion. Determining that this finding was not erroneous, the Fifth Circuit concluded that while the automatic use of race is barred, it can be considered as a relevant factor in the ultimate decision because of the inherent difficulties in interracial adoption. 563 F.2d at 1205. *See generally In re* Adoption of a Minor, 228 F.2d 446, 448 (D.C. Cir. 1955); Compos v. McKeithen, 341 F. Supp. 264, 266 (E.D La. 1972); Comment, *Matching for Adoption: A Study of Current Trends,* 22 CATH. LAW. 70 (1976); Comment, *Religious Matching Statutes and Adoption,* 51 N.Y.U. L. REV. 262 (1976). The Supreme Court has provided some guidance in this area in recent decisions. It appears that even if government activity has a racially disproportionate impact, that impact alone does not prove racial discrimination. *See* Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 161 (1977) (in the area of voting apportionment, the consideration of race is not impermissible); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (proof of racially discriminatory intent or purpose is required to show a violation of the equal protection clause).

The Drummonds' third claim was that the agency's decision cast a stigma upon their reputation. 563 F.2d at 1207-08. In disposing of this issue, the court found that the plaintiffs had failed to demonstrate that they had "been denied a right previously recognized by the state in conjunction with a defamatory finding about them." *Id.* Additionally, the plaintiffs had failed to challenge any of the findings as inaccurate, and there had been no publication outside the context of litigation. *Id.*

[4] The term "psychological parents" reflects the child's perception of those who meet his needs on a continuing basis. *See* Note, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151, 159 (1963) ("A change in

The extensive consideration of the rights and interests embodied in the fourteenth amendment concept of liberty began with *Allgeyer v. Louisiana*,[10] where the Supreme Court held that implicit within the concept of liberty was the right to contract.[11] Although the liberty of contract cases have long since been overruled,[12] the Court has engaged in an ongoing process of bringing certain activities within the ambit of constitutional liberty.[13] Since *Meyer v. Nebraska*,[14] a private realm of family life has been consistently acknowledged.[15] Accordingly,

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custody based solely on biological relationship might, by disrupting the existing relationship of psychological parenthood, work considerable emotional harm upon the child . . . ."). *See generally* Note, *Adoption: Psychological v. Biological Parenthood in Determining the Best Interests of the Child,* 3 Seton Hall L. Rev. 130 (1971).

[5] The final decision to remove Timmy from the Drummond's home and to deny the adoption application was reached at an agency staff meeting. Although the Drummonds were not allowed to attend, a caseworker presented a report of an "evaluation interview," which described the level of care provided by the Drummonds as "excellent." 547 F.2d at 846-49.

[6] 408 F. Supp. at 383.

[7] *Id.*

[8] 547 F.2d at 855. Counsel was appointed for Timmy pursuant to a court order following the dismissal of the complaint. Drummond v. Fulton County Dept. of Family & Children's Serv., 532 F.2d 1001, 1002 (5th Cir. 1976) (per curiam).

[9] 547 F.2d at 857.

[10] 165 U.S. 578 (1897).

[11] *Id.* at 589; *accord,* Adkins v. Children's Hosp., 261 U.S. 525, 545 (1923) (act prescribing minimum wages for women and children held violative of employer's right to contract); Lochner v. New York, 198 U.S. 45, 53 (1905) (law fixing maximum number of working hours held to be an interference with the protected right to contract).

[12] *See, e.g.,* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (minimum wage law for women and children constitutional since there is no right to contract).

[13] *See generally* Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[14] 262 U.S. 390 (1923).

[15] Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (the cases "have respected the

the Court has recognized a right to marry and establish a home,[16] to marry the person of one's own choosing,[17] to have a private marital relationship,[18] to procreate,[19] to bring up one's children according to the dictates of one's own conscience,[20] and to direct the education of one's children.[21] Thus, a constitutionally protected zone of familial privacy exists.[22]

A determination of familial rights requires that a threshold question be answered regarding what constitutes a family and what persons constitute family members. The usual understanding implies a biological parent-child relationship.[23] Indeed, most of the Supreme Court decisions enforcing familial rights have stressed this element.[24] For example, in *Stanley v. Illinois*,[25] the Court spoke of "the rights to conceive and raise one's children."[26] But even though the traditional basis has been conception, the protective scope of the fourteenth amendment has been extended beyond the parent-child relationship.[27] In *Moore*

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private realm of family life which the state cannot enter"). *See generally* Henkin, *Privacy and Personal Autonomy*, 74 COLUM. L. REV. 1410 (1974).

[16] *E.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967).

[17] *E.g.*, *id.*

[18] *E.g.*, Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Since *Griswold*, the constitutional right to privacy concerning sexual activities has been expanded to protect unmarried individuals. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (criminal conviction of doctor for distributing contraceptives to unmarried female held unconstitutional). Similarly, the right has been extended to shield females' abortion decisions. Roe v. Wade, 410 U.S. 113, 153 (1973); Doe v. Bolton, 410 U.S. 179, 195 (1973). For general discussions of the right to privacy, see Beany, *The Constitutional Right to Privacy*, 1962 SUP. CT. REV. 212; Henkin, *supra* note 15; Soifer, *Parental Autonomy, Family Rights and the Illegitimates: A Constitutional Commentary*, 7 CONN. L. REV. 1, 55 (1974).

[19] *E.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); *see, e.g.*, Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 639-40 (1974) (school board's maternity leave policy unconstitutionally infringed upon right of procreation).

[20] Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1972) (compulsory school attendance law held to be a contravention of Amish parents' right to raise their children free from worldly influences); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (state cannot substitute its judgment for that of parents by forcing children to attend public schools). *See generally* Riga, *Yoder and Free Exercise*, 6 J.L. & EDUC. 449, 471 (1977).

[21] *See* cases cited note 20 *supra*.

[22] See notes 14 through 21 and accompanying text *supra*.

[23] Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 843 (1977).

[24] *Id.* (citing Stanley v. Illinois, 405 U.S. 645 (1972); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923)).

[25] 405 U.S. 645 (1972).

[26] *Id.* at 651; *accord*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

In *Stanley*, the children of an unwed father were declared state wards upon the mother's death. The Court held that despite the fact that the children were born out of wedlock, the father, under the due process clause, was entitled to a hearing on his fitness as a parent before his children were taken from him. 405 U.S. at 658.

[27] Indeed, the "parent" in Prince v. Massachusetts, 321 U.S. 158, 166 (1944), was the child's aunt and legal guardian. See note 28 and accompanying text *infra*.

v. City of East Cleveland,[28] the Court extended the protection to a grandmother and her two grandsons, holding that the constitutional protection accorded the "family" is not limited to the "nuclear family."[29]

Nevertheless, the question of whether the foster parent-child relationship[30] is so closely analogous to the traditional and expanding concept of family as to merit the same protection remains unanswered. Unlike the grandmother-grandchildren relationship in *Moore*,[31] the foster family typically has no biological ties whatsoever. The Supreme Court has, however, indicated that a family can be established by means other than consanguinity. In *Smith v. Organization of Foster Families for Equality & Reform*,[32] a group of foster parents sought injunctive relief with respect to New York statutory procedures for removal of foster children from their homes.[33] But because the extensive procedural safeguards[34] were sufficient to protect any possible liberty interest,[35] the Court found it unnecessary to decide the question of whether the foster parent-child relationship is within the protected realm of familial rights.[36] Justice Brennan did, however, indicate a potential constitutional position by declaring, "[B]iological relationships are not exclusive [in a] determination of the existence of a family."[37] Although the question has never been addressed by the Court, the legally adopted child would certainly be considered a full member of the adopting parents' family, even though a biological relationship is not required and is often not present. Therefore, both the parents and children in an adoptive relationship would be accorded the same legal and constitutional familial rights as those biologically related.[38]

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[28] 431 U.S. 494 (1977).

[29] *Id.* at 500-01. The grandchildren in *Moore* were related as first cousins. *Id.* at 496.

[30] "Foster care" has been defined as "a child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period and when adoption is neither desirable nor possible." CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR FOSTER FAMILY CARE 5 (1959), *quoted in* Smith v. Organization for Foster Family Equality & Reform, 431 U.S. 816, 823 (1977). *See generally* V. GEORGE, FOSTER CARE (1970); S. JENKINS & E. NORMAN, FILIAL DEPRIVATION AND FOSTER CARE (1972).

[31] See notes 28 & 29 and accompanying text *supra*.

[32] 431 U.S. 816 (1977).

[33] *Id.* at 818-20.

[34] 431 U.S. at 844. See note 74 *infra*.

[35] 431 U.S. at 844. The Court pointed out that

> where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family.

Id.

[36] *Id.* at 841. See notes 34 & 35 and accompanying text *supra*.

[37] 431 U.S. at 843 (footnote omitted).

[38] *See, e.g.*, Hicks v. Simmons, 271 F.2d 875, 878 (10th Cir. 1959) (the purpose of adoption "is to create and establish a family status in law, i.e., a parent-child relationship"). *See also* MISS. CODE ANN. §§ 93-15-1 to -17-31 (1972).

The lower courts have produced little case law on the issue of foster parent rights.[39] Many jurisdictions, however, have employed some form of the "best interest of the child" test in deciding custody disputes involving foster parents.[40] Under this test, several state courts have awarded custody to foster parents in contests against natural parents, and rights have even been granted to foster parents notwithstanding contractual agreements with placement agencies not to contest removal or petition for adoption.[41] Nonetheless, the law on the subject is, for the most part, unclear and unsettled.

Because of the profound effect the removal from a stable environment may have on a child, it is important to note that liberty rights within the familial zone of privacy are not limited to rights claimed by parents, but also include similar rights claimed by children.[42] The time has long passed when children were considered mere chattels belonging to adults. Indeed, the Supreme Court has proclaimed that children are "persons" who possess certain constitutional rights[43] under the fourteenth amendment.[44] Thus, questions concerning the scope of familial rights attaching to the foster family relationship must be viewed from both the parents' and child's perspectives.

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[39] *See* 11 SAN DIEGO L. REV. 376, 382 (1974) (there is little consistency in foster parent litigation).

[40] *See, e.g.*, Kurtis v. Ballou, 33 App. Div. 2d 1034, 1035, 308 N.Y.S.2d 770, 771 (1970) (often a court must function "as *parens patriae* to do what is best for the interest of the children"). This rule contemplates that the best interests of the child lie with the natural parent, but that presumption may be rebutted by evidence to the contrary. People *ex rel.* Anonymous v. Anonymous, 10 N.Y.2d 332, 222 N.Y.S.2d 945, 946, 179 N.E.2d 200, 201 (1961). *See also In re* Contessora, 75 Misc. 2d 576, 348 N.Y.S.2d 21, 25 (Fam. Ct. 1973).

[41] *See, e.g., In re* B.G., 11 Cal. 3d 679, 523 P.2d 244, 254, 114 Cal. Rptr. 444, 454 (1974) (foster parents with whom child had been placed had standing as de facto parents to appear as parties in proceedings in which the children's mother sought to recover custody); *In re* McDonald's Adoption, 43 Cal. 2d 447, 274 P.2d 860, 868 (1954) (where it was in child's best interest that an adoption petition by foster parents be granted, the consent of the adoption agency was not necessary notwithstanding contractual agreements); Katzoff v. Superior Court, 54 Cal. App. 2d 1079, 1085, 127 Cal. Rptr. 178, 180-81 (1976) (foster parents as de facto parents should be permitted to present their side of the case before the child is removed from their care); *In re* Alexander, 206 So. 2d 452, 452-53 (Fla. Ct. App. 1968) (written agreement between foster parents and state welfare department for care of a foster child which contained a clause providing that "no action for adoption or guardianship may be taken" did not bar foster parents from seeking the adoption of their foster child); Bennett v. Jeffreys, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 824-25, 356 N.E.2d 277, 281 (1976) (where the child has been in the custody of the nonparent for a substantial period of time the best interest of the child is superior to the right of parental custody); People *ex rel.* Anonymous v. Anonymous, 10 N.Y.2d 332, 22 N.Y.S.2d 945, 947, 179 N.E.2d 200, 201 (1961) (the mother of a child born out of wedlock abandoned the child and was not entitled to prevail in a habeas corpus proceeding against the foster parents of the child to obtain custody); Stapleton v. Dauphin County Child Care Serv., 228 Pa. Super. 371, 324 A.2d 562, 568-69 (1974) (foster parents' execution of a contract with the child care agency providing that the agency reserved the right to remove the child at its discretion did not estop the foster parents from bringing an action to prevent the agency's removal of the child); Commonwealth *ex rel.* Bankert v. Children's Serv., 224 Pa. Super. 556, 307 A.2d 411, 414 (1973) (extreme significance should attach to the length of time a child has been in placement and to the quality of the developing relationship). *But see* Roussel v. State, 274 A.2d 909, 927 (Me. 1971) (no justification for creating the potential jeopardy to foster home placement program by holding that judicial hearings must be afforded foster parents who have had a child for a substantial period of time); *In re* Jewish Child Care Ass'n, 5 N.Y. 222, 183 N.Y.S.2d 65, 69-70, 156 N.E.2d 700, 703 (1959) (foster child who had lived with foster parents for four and a half years was returned to her natural mother despite the protests of foster parents). For a criticism of the decision of this case, see Katz, *Legal Aspects of Foster Care*, 5 FAM. L.Q. 283, 290-96 (1971).

A consideration concomitant to the possibility of a protected liberty interest held by a foster parent or child is the extent and type of process a state must provide before infringing upon a protected interest.[45] Notice and opportunity to be heard are the fundamental requisites of due process,[46] but a trial-type hearing is not required in every conceivable case of governmental impairment of private interest.[47] Consequently, the requirements of procedural due process are flexible and vary with the time and circumstances.[48] In *Mathews v. Eldridge*,[49] the Supreme Court delineated the factors to be considered in determining whether the due process clause of the fourteenth amendment has been satisfied. First, the private interest at stake must be considered;[50] second, the governmental interest at stake must be considered;[51] third, an analysis must be made of the risk of erroneous decisions under established procedures and the improvement of decision-making under additional procedural safeguards.[52]

The Supreme Court has recognized that the states have broader authority to regulate the activities of children than of adults.[53] Nevertheless, in *In re Gault*,[54] the Court held that the due process clause requires that juvenile proceedings satisfy at least the essentials of due process and fair treatment.[55] The essentials of due process, however, are not well-defined. The Court, in *McKeiver v. Pennsylvania*,[56] held that the due process clause does not assure the right to trial by jury in state court juvenile delinquency proceedings.[57] Consequently, while due process must be accorded to minors, the level of protection is somewhat lower than that accorded to adults.[58]

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[42] *See, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52, 74 (1976) (right of privacy); Goss v. Lopez, 419 U.S. 565, 574 (1975) (right of property); Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969) (right of expression).

[43] *E.g.*, Goss v. Lopez, 419 U.S. 565, 574 (1974); *In re* Winship, 397 U.S. 358, 365 (1970); Tinker v. Des Moines School Dist., 393 U.S. 503, 511 (1969).

[44] *See, e.g.*, cases cited note 42 *supra*.

[45] See notes 49 through 52 and accompanying text *infra*.

[46] Wolff v. McDonnell, 418 U.S. 539, 563-64 (1974); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); Grannis v. Ordean, 234 U.S. 385, 394 (1914). *See generally* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

[47] Cafeteria Workers v. McElroy, 367 U.S. 886, 894 (1961).

[48] *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (not all situations calling for procedural safeguards call for the same kind of procedure); Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961) (the nature of due process negates any concept of inflexible procedures that are universally applicable without regard to time, place and circumstances).

[49] 424 U.S. 319 (1976).

[50] *Id.* at 355.

[51] *Id.*

[52] *Id.*

[53] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 170 (1944).

[54] 387 U.S. 1 (1967).

[55] *Id.* at 30. In *Gault*, a fifteen-year-old boy had been charged with making indecent remarks in a phone call to a neighbor. No notice of the boy's arrest was given to his parents, nor was the boy present at his hearing. *Id.* The youth was committed as a juvenile

In the instant case, the majority declared that since, under state law,[59] the placement of children in foster homes[60] is merely an alternative to institutional care and since this placement is designed as a transitional phase in a child's life,[61] the state-created relationship between foster parent and foster child is temporary and gives rise to no justifiable expectation that the relationship will remain undisturbed.[62] Furthermore, the court reasoned that since the foster parent relationship is created by state law[63] and since no court has ever recognized such a relationship as the equivalent of a natural or adoptive family, the foster family relationship entails no protected liberty interest.[64] As to the contention of Timmy's independent counsel that a child has a protected liberty right to a stable environment,[65] the court concluded that no liberty interest existed since any interruption in the child's environment was to move him to a place the state deemed superior for his particular needs.[66] In examining the adequacy of the state procedures,[67] the court concluded that an appropriate constitutional compromise had been struck since the removal decision was reached only after several inquiries and interviews conducted by persons trained in psychology and social work.[68] Thus, a formal hearing was constitutionally unnecessary.[69]

In a dissenting opinion,[70] Judge Tuttle was especially critical of the removal

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delinquent until he reached the age of twenty one, and under Arizona law, no appeal was possible, thereby demonstrating the inadequacies of juvenile proceedings prior to the *Gault* decision. *See id.*

[56] 403 U.S. 528 (1971).

[57] *Id.* at 548-51.

[58] *Compare id.* at 548-50 *with* Duncan v. Louisiana, 391 U.S. 145, 149-50 (1968).

[59] See note 2 *supra.*

[60] See note 30 *supra.*

[61] Drummond v. Fulton County Dept. of Family & Children's Serv., 563 F.2d 1200, 1208 (5th Cir. 1977) (en banc), *cert. denied*, 46 U.S.L.W. 3777 (U.S. June 19, 1978) (No. 77-1381).

[62] 563 F.2d at 1208. Special emphasis was placed on the fact that foster parents are considered only on the basis of the quality of temporary care they can be expected to provide. *Id.*

[63] See note 2 *supra.*

[64] 563 F.2d at 1208. The court qualified this conclusion to some degree by noting that its decision in this case does not necessarily control every "foster family" situation, but only those in which a child placement agency charged with the custody of a child places that child for temporary care. Other situations, the court stated, will have to be addressed on a case-by-case basis. *Id.*

[65] See note 8 and accompanying text *supra.*

[66] 563 F.2d at 1208.

[67] See note 5 *supra.*

[68] 563 F.2d at 1210.

[69] *Id.*

[70] *Id.* at 1213 (Tuttle, J., dissenting). Judge Tuttle authored the panel's opinion prior to the rehearing en banc.

process, reasoning that since the state provided no "preremoval procedures" and since the Drummonds were not given the opportunity to be heard at the staff meeting when the removal decision was made, the state's procedures were inadequate to fit any concept of due process.[71] Additionally, Judge Tuttle emphasized that the Supreme Court in *Smith v. Organization of Foster Families for Equality & Reform*[72] did not take the position that foster parents and children could have no protected liberty interest;[73] indeed, the Court took considerable pains to examine the procedural safeguards in that case.[74] Since the Supreme Court, in *Smith*, asserted that there may be instances where foster parents occupy the same place in the emotional life of the foster child as biological parents occupy in the life of the biological child,[75] Judge Tuttle concluded that the Drummonds' relationship with Timmy constituted a liberty right.[76] Thus, the removal procedure was in violation of the fourteenth amendment; accordingly, Judge Tuttle asserted the lower court should be reversed.[77]

The majority in the instant case failed to place sufficient emphasis on the critical language of *Smith v. Organization of Foster Families for Equality & Reform*,[78] language that indicates a trend to expand the scope of protected familial rights.[79] Indeed, the *Smith* Court would probably have openly acknowledged the existence of a liberty interest in certain foster family relationships had it been necessary.[80] The majority in the instant case, however, emphasizes that the relationship is state-created and can thus be state-terminated without the formalities of due process.[81] But the Supreme Court has often held that many property interests, though products of state law, are constitutionally protected.[82] For example, a recipient of state welfare has a protected property interest.[83] More important, however, is the principle that a liberty interest can arise from a state-created family.[84] None would doubt that the liberty interests of both the adopting parents and a legally adopted child would be violated if a state adoption agency decided to remove the child without due process.[85]

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[71] *Id.*

[72] 431 U.S. 816 (1977). See notes 32 through 37 and accompanying text *supra.*

[73] 563 F.2d at 1213.

[74] In comparing the New York procedural scheme approved in *Smith* to the Georgia procedural scheme in the instant case, Judge Tuttle noted that, unlike Georgia, New York granted extensive procedural safeguards, such as a ten day notice of removal, an opportunity for preremoval and postremoval hearings, an agency submission of removal purposes, and judicial review of preremoval and postremoval hearings. *Id.* at 1212-13 (citing Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977)).

[75] 431 U.S. at 844.

[76] 563 F.2d at 1212.

[77] *Id.*

[78] 431 U.S. 816 (1977).

[79]
> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children, as well as from the fact of blood relationship. No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals.

Id. at 844-45 (footnotes omitted) (quoting Wisconsin v. Yoder, 406 U.S. 205, 233 (1972)). *See generally* Moore v. City of East Cleveland, 431 U.S. 494, 500-06 (1977) (expansion of constitutional protection beyond nuclear family); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (privacy rights not confined to family created by legal marriage); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (parental interest extended to unmarried father); Karst, *The Supreme Court, 1976 Term,* 91 HARV. L. REV. 70, 136-37 (1977).

It is especially important to consider the dilemma in which foster parents are placed by the majority's decision in the present case. "The warmer . . . environment of the foster home is intended to be its main advantage over institutional care, yet because in theory foster care is intended to be only temporary, foster parents are urged not to become too attached to the children in their care."[86] It is difficult to see what significant benefits the foster child receives when the foster parents are urged to provide little more than "room and board." Institutions are adequate to provide those necessities. Foster care, in many instances, proves to be anything but temporary. Many children remain in foster homes for several years and some for their entire childhood.[87] Consequently, it is imperative that the courts recognize a form of familial right in the foster relationship to guard against the possibility of capricious or venal removal decisions.

Psychologists have stressed the traumatic effect that shifting a child from one environment to another may have in his personality development. Because of the grave consequences that may result from the child's removal from a stable home environment, it is equally imperative that the child's rights be protected by some form of a hearing.[88] Injustices may result when it is supposed that any foster parent who desires the continuance of the relationship will seek judicial restraint once a removal decision has been made. It is not difficult to perceive the foster parent who, though opposed to the removal decision, succumbs to the imagined higher authority of the state agency.

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[80] See notes 32 through 37 & 74 and accompanying text *supra.*

[81] 536 F.2d at 1207.

[82] *E.g.,* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

[83] *Id.* at 577-78; Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970).

[84] See note 38 *supra.*

[85] See *id.*

[86] Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 836 n.40 (1977). *See generally* Katz, *Legal Aspects of Foster Care,* 5 FAM. L.Q. 283, 301-02 (1971) (stressing the contradictory role that foster parents are asked to play); Comment, *The Foster Parents Dilemma: "Who Can I Turn to When Somebody Needs Me?"*, 11 SAN DIEGO L. REV. 376 (1974) (author urges reform in California's foster parent program to allow foster parents to petition for adoption).

[87] H. MAAS & R. ENGLER, CHILDREN IN NEED OF PARENTS 356 (1959); Comment, *In the Child's Best Interest: Rights of the Natural Parents in Child Placement Proceedings,* 51 N.Y.U.L. REV. 446, 457-58 (1976); *see* Organization of Foster Families for Equality & Reform v. Dumpson, 418 F. Supp. 277, 281 (S.D.N.Y. 1976), *rev'd sub nom.* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977) (median time of foster care in New York is over four years).

[88] *See In re* Jacques, 48 N.J. Super. 523, 138 A.2d 581, 586 (1958) (recognizing the destructive effects of removing a child from the psychological home); Lavigne v. Family

"Liberty"[89] is a broad concept[90] that should gather meaning from progress and experience. Our society is not stagnant, and certain relationships that are not a part of the traditional concept of "family" should be extended full constitutional protection. The foster family of substantial duration is such a relationship.

Wayman Dal Williamson

& Children's Soc'y of Elizabeth, 11 N.J. 473, 95 A.2d 6, 11 (1953) (same); Savit, *Child Placement: Law and Theory,* 20 CATH. LAW. 85, 93-95 (1974) (foster child may suffer psycological trauma by being moved from an environment to which he has become adjusted).

[89] U.S. CONST. amend. XIV, § 1.

[90] *See generally* cases cited note 13 *supra.*

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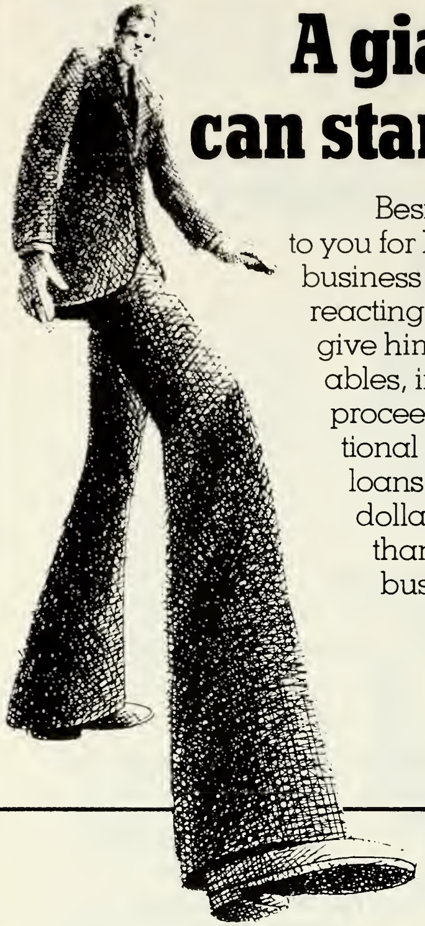

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